BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

COMMENTS OF AT&T WIRELESS SERVICES, INC. ON NOTICE OF PROPOSED RULEMAKING

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EXECUTIVE SUMMARY

AT&T Wireless Services, Inc. ("AWS") fully supports the Commission's proposal in the Notice of Proposed Rulemaking ("NPRM") to adopt a system of bill and keep for all intercarrier compensation. AWS believes that a unified bill and keep compensation scheme for all types of traffic would not only be the most efficient and pro-competitive method of compensation, but also the most technologically and competitively neutral. As the Commission properly recognizes, current intercarrier compensation schemes have led to many inefficient, inconsistent, and inequitable results for commercial mobile radio service ("CMRS") providers and other carriers. Bill and keep would address these inefficiencies and promote the development of CMRS as a viable competitive alternative to local landline services. The Commission should exercise its plenary authority under 47 U.S.C. § 332 to regulate interconnection matters concerning CMRS providers and incumbent local exchange carriers in tandem with its authority under 47 U.S.C. §§ 251 and 252.

In adopting a bill and keep system, the Commission should clarify and reaffirm its pro-competitive rules concerning points of interconnection and delivery of traffic. AWS proposes a system in which both the incumbent carrier and the interconnecting carrier equally share in the costs of transport between networks and competitive carriers, including CMRS providers, may choose the points of interconnection. At the same time, the terminating carriers should be able to designate, through the LERG, the point at which traffic is delivered to it.

To the extent that the Commission declines, however, to adopt a bill and keep system for all types of traffic, AWS urges the Commission to exercise its plenary authority under section 332 and sections 251 and 252 of the Communications Act of 1934, as amended, and adopt bill and keep at a minimum for CMRS local and long distance traffic. As discussed in these comments, the current access charge regime results in particular inefficient and inequitable

outcomes for CMRS providers and accordingly, a system of bill and keep for both local and long distance CMRS traffic is necessary to address these problems.

If the Commission determines to maintain the "calling party's network pays" system despite all the evidence on the record supporting bill and keep, however, AWS urges the Commission to expressly reaffirm certain of its rules and clarify or establish new rules in order to ensure an efficient and pro-competitive marketplace for all carriers, including CMRS providers. In particular, the Commission should require incumbent carriers to establish points of interconnection with interconnecting carriers as requested, as long as technically feasible; to share the costs of interconnection; and to route traffic as designated by the terminating carrier. The Commission also should reaffirm that the presence of transiting carriers, whether incumbent local exchange carriers or interexchange carriers, does not alter the Commission's mandate that all intraMTA traffic is subject to local reciprocal compensation.

Moreover, the Commission should reaffirm that forward looking incremental costs should form the basis of interconnection charges and that to the extent that an individual competing carrier has costs that may be greater than those of the incumbent carrier, such competing carrier may demonstrate, and seek recovery, of such additional costs. The Commission should also conclude that use of virtual NXXs should not require additional compensation; in particular, the Commission should recognize that such a scheme cannot be imposed upon CMRS providers. Finally, the Commission should reaffirm its basic rules that CMRS providers are entitled to equal and nondiscriminatory access to interconnection and unbundled network elements and that CMRS providers are entitled to opt into part or all of existing interconnection agreements between incumbent carriers and competitive carriers. As discussed in these comments, express reaffirmation of these existing rules and establishment of

new rules is necessary to address the current system's resulting inequitable impacts on CMRS providers.

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AT&T Wireless Services, Inc. ("AWS") submits these comments in support of the Commission's proposal in the Notice of Proposed Rulemaking in this proceeding, FCC 01-132, released April 27, 2001 ("NPRM") that all types of traffic should be exchanged among all carriers, including commercial mobile radio service ("CMRS") providers, on a bill and keep basis. As is explained fully below, adopting such a unified system for all kinds of traffic would advance the Commission's goals of encouraging efficient and universal use in the telecommunications network and promoting the efficient development of competition. A bill and keep compensation scheme also is consistent with the procompetitive mandates of the 1996 Telecommunications Act ("1996 Act") and the deregulatory framework for CMRS providers established by the Omnibus Budget and Reconciliation Act of 1993 ("OBRA") in 47 U.S.C. § 332.

I. INTRODUCTION AND SUMMARY

AWS, and its predecessor companies like McCaw Cellular Communications, Inc., have participated in the CMRS industry's efforts to obtain interconnection and reciprocal compensation on a fair and equitable basis from incumbent local exchange carriers ("ILECs") since the early 1980s. This Commission's strong assertion of jurisdiction over CMRS-ILEC

interconnection issues, particularly since passage of OBRA in 1993, has been essential to ensuring both fully interconnected networks and the introduction of reciprocal compensation between CMRS providers and ILECs. By asserting its unique authority over CMRS-ILEC interconnection in parallel with its authority to open markets under the 1996 Act, the Commission has facilitated the astounding growth of CMRS while adopting an interconnection scheme that avoids discrimination among carriers based on the technology they deploy.

At the same time, AWS and other CMRS providers have made wireless service part of the fabric and culture of American society to an extent and in ways unimaginable to even the most visionary of CMRS pioneers.[1] In its Sixth Report on CMRS Competition, the Commission found that mobile telephony providers continue to experience record growth and now provide service to more than 109 million customers—or more than 39% of the U.S. population. In addition, competition in the sector is vigorous—91% of the population have a choice of at least three providers and almost 50% may choose among at least six different providers.[2] As CMRS networks continue to evolve and develop, however, issues of interconnection and reciprocal compensation with the ILECs remain as barriers to the full development of CMRS.

The approach proposed by the Commission in this *NPRM* would go far towards removing those remaining barriers and would help set the stage for CMRS to become a more viable alternative to the landline network. A system of bill and keep for termination of traffic that does not distinguish among carriers based on the type of traffic they carry, or the technology they

[1] As is discussed more fully below, the calling patterns of CMRS customers, as well as the traffic balance between landline and CMRS networks, continue to evolve as CMRS becomes a more robust competitive alternative. It is vital, therefore, that the Commission look at long-term trends in the relationship between landline and CMRS networks. This approach is economically sound and consistent with the Commission's forward-looking cost methodology.

[2] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 01-192 (rel. July 17, 2001) at p. 6.

deploy, will foster efficiency in individual networks and lessen the need for regulatory intervention. But, once such a system is in place, the Commission's role in assuring nondiscriminatory interconnection and transport among networks will increase in importance. The ability of ILECs to charge other carriers to terminate traffic on their ubiquitous networks has provided some incentive for ILECs to facilitate exchange of traffic with competitive carriers. Once those providers stop paying the ILECs to terminate their traffic and as the competitive carriers' market share increases, it is likely that the ILECs will be even less willing to agree to fair and reasonable interconnection terms.

The Commission, therefore, should devote equal attention to issues concerning how networks interconnect, *i.e.*, allocation of transport costs, choice of points of interconnection and delivery of traffic, along with establishing a bill and keep system for termination of traffic. AWS urges the Commission to reaffirm its existing rule allowing competitive carriers to interconnect directly or indirectly with all other carriers via technically feasible points the competitive carrier chooses on ILEC networks, as long as the competitive carrier chooses one point of interconnection ("POI") per LATA.[3] This rule, coupled with adoption of a rule requiring connecting carriers to share equally in the costs of transportation between networks, using two-way facilities, will maximize engineering and economic efficiency and provide the proper incentives, given the ILECs' market power, to choose appropriate points and means of interconnection. At the same time, the Commission should establish a rule that requires traffic to be delivered at the interconnection point in a LATA chosen by the terminating carrier – otherwise, originating carriers may be given incentives to deliver traffic in ways that harm

[3] *See* 47 U.S.C § 251(c); *see also* 47 C.F.R. § 51.321. Where ILECs are permitted to cross LATA boundaries and the MTA for CMRS also crosses LATA boundaries, the Commission should allow one POI per Metropolitan Trading Area ("MTA").

network reliability and impede carriers' ability to provide their customers with a predictable quality of service.

AWS strongly concurs with the Commission's proposed tests for efficiency and consumer welfare as well as the goals of eliminating unnecessary regulatory intervention and noneconomic opportunities for arbitrage and reducing transaction costs.[4] Not only these goals, but also subsidiary ones such as increased competitive and service alternatives and technological neutrality, would be served by a system in which each carrier must recover its own network costs from its customers and share equally in the costs of transport to points chosen by competitive carriers. Furthermore, the Commission's recognition that both called and calling parties benefit from the ability to communicate with each other provides support for a bill and keep system and is consistent with the nearly uniform experience of CMRS providers in the United States—that consumers will pay both to make and receive calls.[5]

A bill and keep regime also is fully consistent with the legal mandates of the 1996 Act and OBRA. Given the Commission's plenary jurisdiction under OBRA over CMRS-ILEC issues and the unique characteristics of CMRS networks, the Commission has more than ample basis to conclude that a bill and keep regime would satisfy the requirements of 47 U.S.C.

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[4] *See* In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking,* FCC 01-132 at ¶ 33 (rel. Apr. 27, 2001) ("*NPRM*"). All of these rules should be adopted as default outcomes, allowing connecting carriers to negotiate other options if they wish.

[5] *See id.* at ¶ 37. SBC has incorrectly suggested that, because a CMRS provider charges its own end-user for receipt of a call, the CMRS provider's receipt of reciprocal compensation for terminating a call amounts to double recovery. *See* In the Matter of Cost-Based Terminating Compensation for CMRS Provider*s*, CC Docket Nos. 95-185 and 96-98 at 5, WT Docket No.97-207, *Application for Review of SBC Communications, Inc*. (June 8, 2001). Such a suggestion is unsupported by the facts, given that CMRS providers typically have higher costs to originate and terminate calls, and that the Commission has ruled unequivocally that CMRS providers are entitled to reciprocal compensation for transport and termination of a local call. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order,* 11 FCC Rcd. 15499 at ¶ 1043 (1996) ("*Local Competition Order*"). In any event, a bill and keep system will also eliminate such false concerns by ILECs, which are designed to prevent competitive carriers from obtaining compensation for their transport and termination of calls.

§ 252(d)(2). In the same vein, giving competitive requesting carriers the choice of interconnection points and requiring equal allocation of transport costs is supported by prior interpretations of sections 251 and 252 and is also well within the boundaries of the Commission's CMRS-ILEC interconnection authority.

The following comments first provide a brief historical overview of this Commission's prior efforts to resolve issues regarding CMRS-ILEC interconnection, demonstrating that, although the Commission has accomplished much, substantial problems remain. In conjunction with that overview, AWS provides information on calling patterns between CMRS and landline networks. This information shows the long-term evolution towards balance in traffic, with mobile-to-land calling increasing, among other reasons, because of lower rates wireless carriers are able to offer their customers as a result of decreasing costs. AWS also provides information on the status of its unregulated agreements with other CMRS providers, showing that they follow the economically rational approach of bill and keep and avoid both transaction costs and the need for regulatory intervention.

Second, the comments describe the legal framework for further action, showing that the Commission's authority over CMRS pursuant to section 332 should be employed in tandem with the Commission's authority under sections 251 and 252. Thereafter, the comments explain AWS' support for a system of bill and keep and the necessity of strong Commission direction regarding points of interconnection and delivery of traffic as well as the sharing of costs for transport between networks. In addition, the comments advocate the Commission's adoption of a bill and keep regime for all traffic subject to access charges. Finally, in the event that the Commission declines to adopt a bill and keep regime for all intercarrier compensation and decides to continue with its current "calling-party's-network-pays" ("CPNP") system, AWS

urges the Commission to reaffirm certain existing pro-competitive rules and to establish new rules, that would, among other things, promote efficient competition and non-discriminatory treatment of all carriers, including CMRS providers.

II. THE HISTORY OF CMRS-ILEC INTERCONNECTION DEMONSTRATES BOTH THE ANTICOMPETITIVE CONDUCT OF ILECS AND THE NEED FOR COMMISSION ACTION

Since its inception, the CMRS industry has struggled to overcome problems of interconnection with the ILECs. As reflected in a series of Commission orders beginning in the mid-1980's, those problems have ranged from outright refusals to provide technically efficient physical interconnection to rate discrimination.[6] While the Commission has achieved real progress in addressing these issues since the passage of OBRA and the 1996 Act, ILEC abuses continue in many forms, demonstrating the continued presence of ILEC incentives and market power to forestall CMRS competition. The *NPRM* represents the Commission's best chance to resolve those issues broadly to the benefit of all consumers and thus minimize the need for ongoing regulatory intervention.[7]

A. Prior to Passage of OBRA and the 1996 Act, the Commission Was Hamstrung in Addressing the Full Range of Barriers to Entry

The Commission issued its first order on interconnection between CMRS providers and LECs in the mid-1980s, shortly after it granted the initial cellular licenses. That order demonstrates the intransigent positions of all LECs and the level of difficulties experienced by CMRS providers in their efforts to obtain interconnection with ILECs. At the most elemental

[6] *See generally,* In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*,* 59 RR 2d 1275 (1986) ("*Interconnection Order*"); In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Third Report and Order*, 9 FCC Rcd. 7988 (1994).

[7] Although AWS' comments are focused on CMRS-ILEC interconnection, AWS supports a unified approach to intercarrier compensation and related interconnection issues for all carriers.

level, the Commission was forced to declare that CMRS providers were "co-carriers" providing local service, not end-users or interexchange carriers,[8] and that, as "co-carriers," CMRS providers were entitled to request and negotiate interconnection arrangements on a nondiscriminatory basis. Moreover, the Commission was forced to address technically efficient interconnection by giving the CMRS provider the option of choosing interconnection points, *i.e.*, tandem versus end offices, and the right to obtain and deploy central office codes ("NXXs").[9] On cost and rate issues, unfortunately, the Commission deemed itself without authority because of the local and intrastate character of most CMRS calling; this left CMRS providers in the difficult position of seeking nondiscriminatory rates and mutual compensation from state commissions.[10]

Just two years later, the Commission again attempted to address the concerns of CMRS providers with interconnection abuses by ILECs.[11] Again, the Commission affirmed the co-carrier status of CMRS providers, the duty of ILECs to negotiate in good faith, and the mandates that ILECs provide NXX codes. At the same time, however, the Commission reaffirmed the limits of its authority over rate issues, essentially deferring to the states, while espousing the principles of cost-based and mutual compensation.[12]

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[8] *Interconnection Order* at ¶ 12.

[9] *Id.* at ¶¶ 2-4.

[10] When CMRS providers attempted to seek adjudication of rate issues from state commissions, they were not well received. In such cases, CMRS providers were forced to pay rates exceeding 2¢ or 3¢ per minute. *See, e.g.,* Florida PSC Docket No. 870675-TL, Order No. 20475, at 16-20 (issued Dec. 20, 1988). Prior to the mid-1990s, CMRS providers were entirely denied any payments for calls terminated on their networks. *See., e.g., id.* at 8-9; Informal Complaint of AT&T Wireless Services of California, Inc. Against Pacific Bell, IC No. 98-01614 (filed March 24, 1998).

[11] In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Service (Cellular Interconnection Proceeding*)*, *Memorandum Opinion and Order on Reconsideration*, 4 FCC Rcd. 2369, FCC 89-60 (1989) ("*CMRS Interconnection Opinion"*).

[12] The ILECs strongly objected to these Commission principles on the grounds that the services at issue were exclusively intrastate in nature. *Id.* at ¶¶ 20-22.

Within this framework, CMRS providers were able to establish physical interconnection and obtain telephone numbers for their subscribers. But, given the Commission's admitted jurisdictional limits, rate discrimination by ILECs was widespread and, at least in the experience of AWS' predecessor companies, ILECs uniformly refused to pay CMRS providers for termination of traffic, and in a number of cases, required CMRS providers to pay for the traffic the ILEC originated. These developments, along with other constraints on the growth of the CMRS industry, set the stage for the passage of OBRA in 1993.

B. OBRA Provided the Commission with Plenary Jurisdiction Over CMRS-ILEC Interconnection Issues

As is discussed more fully below, OBRA represented a sea change for the Commission and the CMRS industry it regulates. Not only did Congress establish a deregulatory, nationwide policy for CMRS, but it also expressly addressed and confirmed the authority of the Commission over interconnection issues involving CMRS.

After passage of OBRA, the Commission sought to employ its new authority in a number of proceedings. Initially, the Commission took a modest step and reaffirmed its interconnection principles, while it noted the possible impact of section 332 on its jurisdiction over CMRS-ILEC interconnection.[13] But in its Notice of Proposed Rulemaking on Interconnection between Local Exchange Carriers and CMRS Providers, CC Docket No. 95-185 ("*LEC-CMRS Interconnection NPRM*"), the Commission proposed a bolder step—fully asserting its jurisdiction and mandating, on at least a temporary basis, a system of bill and keep between CMRS providers and LECs.[14]

[13] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd. 1411, FCC 94-31 at ¶¶ 230-32 (1994) ("*CMRS Second Report and Order*").

[14] In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers, CC Docket No. 95-185, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 5020, FCC 95-505 (1996) ("*LEC-CMRS Interconnection NPRM*").

Although the passage of the 1996 Act redirected the Commission's focus away from a separate rule for CMRS-LEC interconnection, the course of action proposed in the *LEC-CMRS Interconnection NPRM* both demonstrated the reach of the Commission's authority and led to development of an extensive record on the breadth and variety of ILEC abuses. That record demonstrated the efficacy of the Commission's orders on the technical conditions of interconnection, but also showed the minimal impact of its admonitions that CMRS providers should pay only cost-based rates for termination and should receive mutual compensation.

C. The 1996 Act, Coupled with OBRA, Provided the Basis for Commission Action on Reciprocal Compensation Rates

In the *Local Competition Order*, the Commission addressed the interconnection issues between CMRS providers and ILECs within a broader, competitive context. Using its authority under the 1996 Act and OBRA in tandem, the Commission treated CMRS providers in the same way as competitive local exchange carriers ("CLECs") for some purposes, but also recognized the unique role of CMRS providers and their distinct methods of service. The following resulted from this approach:

- CMRS providers are treated as "requesting carriers," like CLECs, for the purposes of negotiating arrangements for interconnection, unbundled elements and cost-based compensation under sections 251 and 252. *Local Competition Order* at ¶¶ 33, 1023.
- ILECs are prohibited from discriminating among carriers because of the technology they use or their regulatory status. *Local Competition Order* at ¶ 218.
- ILECs are required to pay CMRS providers to terminate ILEC-originated traffic on CMRS networks. Absent a separate demonstration of costs by the CMRS

carrier, ILECs are to pay the same rate as the CMRS carrier pays to terminate traffic.[15] *Local Competition Order* at ¶¶ 1008, 1045.

- CMRS providers may avail themselves of the arbitration procedures of section 252, but other remedies, *i.e.*, section 208 complaints, remain available as well. *Local Competition Order* at ¶¶ 127, 1023.
- CMRS providers, because of historical abuses, were entitled to a "fresh look" to re-open contracts that failed to provide for payments by the ILEC for termination of traffic on CMRS networks. 47 C.F.R. § 51.717; *Local Competition Order* at ¶ 1095.
- CMRS providers' local calling areas were defined by the Commission, not state commissions, because of the federal licensing jurisdiction and the Commission's plenary authority under OBRA.[16] *Local Competition Order* at ¶ 1035.

D. CMRS Providers' Interconnection Experiences Under the *Local Competition Order* and the 1996 Act

In the wake of the *Local Competition Order*, and through several years of negotiations and arbitrations, CMRS providers made substantial strides in reaching agreements to pay cost-based rates for termination and to receive reciprocal compensation. In AWS' experience, most ILECs have been willing to agree to treat CMRS providers as requesting carriers and charge them rates based on total element long-run incremental cost ("TELRIC") for termination of

[15] In *U.S. West Communications, Inc. v. Washington Utilities and Transport Com'n,* 225 F.3d 990 (9th Cir. 2001) ("*US West v. WUTC*"), the Ninth Circuit affirmed that CMRS providers are entitled to be paid the tandem rate of the ILEC so long as the CMRS carrier serves a comparable geographic area.

[16] Deliberately left unanswered in the *Local Competition Order* was the full reach of the Commission's authority over CMRS providers. As is discussed below, case law and other developments have made clear the expansive character of that authority.

traffic.[17] On the other hand, while many states ordered bill and keep for traffic between CLECs and ILECs, CMRS providers routinely were forced to pay monetary compensation to ILECs through minute-of-use charges. ILECs also have resisted paying the full termination rate for terminating traffic on CMRS networks, and, in some instances, CMRS providers have been forced to arbitrate that issue.[18] Given resource constraints, AWS has been forced to agree to some contracts in which it did not receive the full tandem rate and to make other compromises as well.

With regard to other interconnection issues, the record has been mixed. Although ILECs have given lip service to the notion that CMRS providers were entitled to unbundled elements and cost-based pricing on a nondiscriminatory basis, they have refused to implement these principles by converting special access circuits to unbundled elements or allowing CMRS providers to order new facilities as UNEs ("unbundled network element"). ILECs have also resisted giving CMRS providers contractual features such as performance standards and access to operational support systems ("OSS") that they routinely give CLECs. More generally, ILECs have sought to force CMRS providers to accept a separate class of less comprehensive "wireless agreements," claiming that the deregulated status of CMRS and the MTA-based local calling areas[19] somehow require such separate (and unequal) agreements.

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[17] The Eighth Circuit decision affirming the Commission's special authority over CMRS was critical in this regard. *See Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*Iowa Board"*). Pursuant to 47 C.F.R. § 51.717, AWS was able to escape prior contracts that had excessive ILEC termination rates and provided no reciprocal compensation to AWS. Today, AWS pays termination rates to most ILECs ranging from .15¢ to .9¢ per minute of use; these rates are subject to the impacts of the Commission's *ISP Intercarrier Compensation Order*, which remain to be seen. *See* In the Matter of Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on Remand and Report and Order*, FCC 01-131 (rel. Apr. 27, 2001) ("*ISP Intercarrier Compensation Order*").

[18] *See generally U.S. West v. WUTC,* 255 F.3d 990.

[19] CMRS providers' local calling areas were defined by the Commission as the Metropolitan Trading Area ("MTA").

AWS' experience with negotiating interconnection contracts for its fixed wireless applications has demonstrated that the problems CMRS providers are experiencing today will only increase and intensify as CMRS providers place increasing competitive pressure on the landline business. For fixed wireless applications in particular, ILECs have played a shell game, first refusing to include necessary elements for fixed services, *i.e.*, local number portability ("LNP"), directory listings, landline-type 911 connections and access to OSS, in the same contracts as apply to mobility services, demanding instead that AWS become certificated as a CLEC and enter into a separate CLEC agreement in order to obtain access to interconnection rights under the 1996 Act.

Even in those instances where ILECs ultimately acquiesce, they still engage in obstructionist tactics designed to impede competition. For example, one ILEC who agreed after lengthy negotiations to include access to elements such as OSS in the AWS mobility interconnection agreement, sent termination notices on the contracts within weeks of their submission for approval to the relevant state commissions. The only reason proffered for terminating the contracts was a desire to negotiate separate agreements for CMRS mobility and fixed wireless services – the very issue that the parties had spent months earlier negotiating.

A separate set of issues have arisen with independent ILECs that have sought to escape the procompetitive mandates of the 1996 Act by claiming they have no obligations to CMRS providers with which they are not directly connected. In a number of states, those independent ILECs have sought to impose access charges and other non cost-based charges on mobile-to-land traffic under the theory that the Commission's intra-MTA reciprocal compensation rule does not apply if another ILEC or carrier transits calls between the independent carrier and the CMRS provider. At the same time, those independent ILECs also claim they owe no reciprocal

compensation payments to CMRS providers for land-to-mobile traffic if the calls they direct to CMRS providers pass through another transiting carrier.[20]

AWS submits that CMRS providers should not be required to directly connect with every carrier with which they exchange minimal traffic in order to maintain their right to reciprocal compensation. The public interest is not served if CMRS providers are penalized for using indirect forms of interconnection that are expressly authorized by the 1996 Act and the Commission's rules[21] and are economically sound given trunking efficiencies that are gained by combining the small amounts of CMRS traffic with the ILECs' greater volumes destined for the independent ILECs. The Commission should address these indirect interconnection issues,[22] either by solving them altogether by adopting a bill and keep rule that applies to all traffic, including indirect traffic, or, at a minimum, by confirming that indirect interconnection is equally subject to reciprocal compensation, regardless of the identity of the carrier that transits the traffic.

In dramatic contrast to the issues that have arisen with independent ILECs, CMRS providers have negotiated and agreed to interconnect with each other without the need for regulatory intervention. Where CMRS providers exchange traffic indirectly through an ILEC, they have avoided the need for contracts altogether in many instances, but uniformly have agreed to bill and keep agreements. In some instances, where traffic volumes warrant it, CMRS providers have interconnected directly, again agreeing to bill and keep for traffic termination, and sharing in the costs of transport between them. These arrangements, negotiated in an

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[20] *See, e.g.*, In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service, Missouri Public Service Commission, *Report and Order*, Case No. TT-2001-139 (Feb. 28, 2001).

[21] 47 U.S.C. § 251(a)(1).

[22] *See NPRM* at ¶¶ 91, 92.

environment where neither party has market power and with the option of indirect interconnection always present, should serve as a model for the Commission.

E. The Evolution of Traffic Patterns Shows the Importance of Eliminating Excessive Costs of Interconnection

The early proceedings in which the Commission addressed CMRS-ILEC interconnection were critical to development of CMRS networks and services. Without strong Commission mandates on physical interconnection of networks and more efficient forms of interconnection, CMRS might have remained a subsidiary, adjunct service, not the robust competitive alternative it is becoming.

The Commission's more recent actions, requiring cost-based and reciprocal compensation, have been a significant factor in lowering CMRS providers' interconnection costs. These reduced costs have been a significant factor in enabling CMRS providers to lower rates and offer innovative rate plans that, among other things, have encouraged CMRS subscribers to disseminate their calling numbers more widely (and thus receive more incoming calls).

This has created a positive feedback cycle—lowered interconnection costs help produce lower rates, which in turn leads to greater balance in CMRS-to-landline and landline-to-CMRS calling. In fact, AWS' experience demonstrates that, over time and with proper pricing for interconnection, calling in both directions likely will achieve rough equality. Indeed, in some markets today, such equality exists and in all AWS' markets the trends are leading to equal traffic flows in both directions.[23] Although the particular traffic flows in individual AWS markets is competitively sensitive and proprietary, AWS' major markets' traffic flows range

[23] Originally, mobile-to-land traffic predominated as cellular customers were reluctant to broadly disseminate their calling numbers because they paid a high per-minute rate for calls they received.

from 35% to 45% land to mobile.[24] This is consistent with a recent report from Merrill Lynch which states that traffic ratios for LEC-CMRS traffic are between 55%/45% and 70%/30%.[25] This is a significant increase from the 20% land to mobile traffic flow cited in the *Local Competition Order* in 1996.[26] In short, the Commission should take a long-term view on the balance of traffic between networks and should recognize that its actions may contribute to traffic balance in the long run.

III. THE LEGAL FRAMEWORK

The Commission raises several key legal issues in the *NPRM*: (1) what is the respective scope of the Commission's and the states' authority over CMRS-ILEC interconnection under sections 251, 252 and 332;[27] (2) how should that jurisdiction be exercised and should the Commission forbear from any of the relevant statutory provisions;[28] and (3) how and when can bill and keep be mandated.[29]

The Eighth Circuit decision in *Iowa Board* confirms that the scope of the Commission's jurisdiction over CMRS-ILEC interconnection is quite broad under sections 332, 201 and 2(b) of the Act. Although AWS advocates a unified system of bill and keep for all carriers pursuant to the Commission's authority under sections 251 and 252, AWS asserts that sections 332, 201 and 2(b) of the Act provide an independent (and unassailable) source of authority for a bill and keep regime for CMRS providers. In spite of its unique jurisdiction over wireless carriers, the Commission should continue to apply the section 251/252 framework to CMRS providers and

[24] AWS will provide traffic flow information, upon request to the Commission staff under seal.

[25] *The Next Generation IV; Wireless in the U.S.*, Merrill Lynch, March 10, 2001 at 54.

[26] *Local Competition Order* at ¶1109.

[27] *NPRM* at ¶¶ 85-87.

[28] *NPRM* at ¶ 89.

[29] *NPRM* at ¶ 90.

should not forbear from any of its provisions. Although the current fifty state approval process is burdensome, AWS does not now request that the Commission insert itself into the day-to-day approval process. Instead, the Commission should actively oversee that process for all CMRS-ILEC agreements and stand ready to preempt the states to the extent that their actions threaten to impinge upon the continued development of ubiquitous CMRS.

A. The Commission Has Broad Authority over CMRS-ILEC Interconnection, Including the Authority to Establish Bill and Keep

In addition to its authority under sections 251 and 252 over interconnection matters generally, the Commission has plenary jurisdiction over CMRS-ILEC interconnection under sections 332, 201 and 2(b) and may control both the physical and rate aspects of such interconnection. Under these statutory provisions, the Commission has the right to preempt state jurisdiction over CMRS-ILEC interconnection under sections 251 and 252 and the authority to establish a bill and keep regime for wireless carriers.

In the *Local Competition Order*, the Commission recognized sections 332 and 201 as a basis for jurisdiction over CMRS-ILEC interconnection, but instead chose to rely on sections 251 and 252. In explaining its reasoning for this decision the Commission stated that:

> By opting to proceed under sections 251 and 252 we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time to LEC-CMRS interconnection.[30]

In *Iowa Board* the appellate court vacated all of the Commission's pricing rules on the grounds that the states had exclusive authority over pricing matters under sections 251, 252 and

[30] *Local Competition Order* at ¶ 1023.

2(b). The Court, however, upheld the Commission's jurisdiction under sections 332 and 2(b) to adopt certain pricing rules for CMRS-LEC interconnection:

> Because Congress expressly amended section 2(b) to preclude state regulation of entry and rates charged by Commercial Mobile Radio Service (CMRS) providers, see 47 U.S.C. §§ 152(b) (exempting the provisions of section 332), 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to CMRS providers, *i.e.* 47 C.F.R. §§ 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717, but only as these provisions apply to CMRS providers.[31]

The *Iowa Board* decision is critically important for a number of reasons. As an initial matter, *Iowa Board* confirms the Commission's conclusion in the *Local Competition Order* that section 332 continues to provide the Commission with authority to regulate CMRS-ILEC interconnection after the passage of the 1996 Act and the adoption of sections 251 and 252. The *Iowa Board* decision also confirms that in those instances where the state had been given authority over interconnection matters generally (*e.g.*, sections 251 and 252), the Commission can, if it chooses, preempt that jurisdiction and issue rules of "special concern to CMRS providers" that the states must follow. Those rules can either provide the state with a continuing role with regard to the interconnection matter in question[32] or can remove all state discretion.[33] Perhaps most significantly for the issue at the heart of this *NPRM*, the *Iowa Board* decision unequivocally establishes that the Commission has the right to establish rates for CMRS-ILEC interconnection and to preempt any rates the state might establish.[34]

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[31] *Iowa Utils Bd. v. FCC,* 120 F.3d at 800.

[32] *See, e.g.,* 47 C.F.R. § 51.715 (state commissions to require rate "true-ups").

[33] *See, e.g.,* 47 C.F.R. § 51.703 (ILECs required to establish reciprocal compensation arrangements and prohibited from charging for traffic that originates on the ILEC network; states provided with no discretion).

[34] By citing to section 332(c)(3) and upholding the pricing rules, *Iowa Board* confirmed that section 332 preempted state regulations not only of end-user rates, but also of carrier-to-carrier rates. The Commission reached

The D.C. Circuit recently affirmed this interpretation of *Iowa Board* in *Qwest v. FCC*. In *Qwest v. FCC*, the D.C. Circuit upheld the Commission's right under section 332 to use its section 208 complaint procedures to enforce certain ILEC interconnection obligations to CMRS providers.[35] The appellate court specifically rejected the appellant ILEC's contention that the CMRS provider could enforce its interconnection rights only through the state controlled negotiation and arbitration provisions of section 252. Reading these two decisions together, it is unquestionable that under sections 332, 201 and 2(b) the Commission may establish and enforce rules regarding CMRS-ILEC interconnection—even in those areas where the states were given authority by the 1996 Act.

This is not to say, however, that the states have no jurisdiction over CMRS-ILEC interconnection or that sections 251 and 252 do not apply to CMRS providers. To the contrary, the 1996 Act established a comprehensive framework for interconnection between all types of telecommunications carriers. AWS believes that the Commission rightly decided in the *Local Competition Order* that CMRS providers are "telecommunications carriers" and "requesting carriers" subject to the rights and obligations established in sections 251 and 252.[36] Moreover, the 1996 Act gave states an important role in overseeing and managing the interconnection process for all telecommunications carriers, including CMRS providers.[37] Because of the Commission's additional authority under section 332, however, state commissions must follow the Commission's direction on CMRS-ILEC interconnection and the state commissions' actions

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(Footnote continued)
the same tentative conclusion in its *LEC-CMRS Interconnection NPRM*, but because of the passage of the 1996 Act never adopted that conclusion. *See LEC-CMRS Interconnection NPRM,* 11 FCC Rcd. 5020, FCC 95-505 at ¶ 111.

[35] *Qwest v. FCC*, 252 F.3d 462, 465 (D.C. Cir. 2001).

[36] *Local Competition Order* at ¶¶ 33, 1004, and 1012.

[37] Although the states must exercise their authority in a manner that is consistent with the Commission's rule. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999).

under section 252 are subject to preemption by the Commission to the extent it chooses to exercise its jurisdiction.[38]

B. The Commission Should Exercise Its Authority Over CMRS-ILEC Jurisdiction in a Manner That Meets Its Twin Goals of Promoting Uniformity and Establishing a Competitive Nationwide Market for CMRS Services

The Commission should continue to apply sections 251 and 252 to CMRS providers and should not forbear from any of the statutory provisions.[39] Instead, the Commission should focus its energies on revising its interconnection rules to address critical problems that are barriers to the full development of CMRS and to provide additional guidance about the respective rights and obligations of telecommunications carriers under sections 251 and 252. At the same time, the Commission should allow the states to maintain their current process of overseeing the negotiation and arbitration of all interconnection agreements with ILECs, including CMRS-ILEC agreements, while continuing to use its section 332 authority to address matters that are of special concern to the wireless industry.

Although the Commission has authority under section 10 and section 332(c)(1)(A) to forbear from applying all or a part of sections 251 or 252 to CMRS providers (if the requisite tests are met), the public interest would be better served by the continued application of the 251/252 statutory framework to LEC-CMRS interconnection. As explained above, CMRS providers have experienced problems in negotiating interconnection agreements with and obtaining facilities from ILECs. However, for the most part, the section 251/252 statutory framework has worked.

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[38] *Id.*

[39] *NPRM* at ¶ 89.

Before the adoption of sections 251 and 252, CMRS providers had the right to interconnect their facilities with ILEC facilities under the general provisions of sections 201 and 332. Although the Commission had interpreted those sections to afford CMRS providers many of the same substantive rights codified in sections 251 and 252, CMRS providers found it challenging at best to obtain interconnection at reasonable rates and terms prior to the adoption of the 1996 Act.[40] It was not until the passage of the 1996 Act and the adoption of rules in the *Local Competition Order* that CMRS providers began to make significant progress in obtaining interconnection at reasonable rates, terms and conditions from the ILECs.

There are a number of reasons why the section 251/252 framework works better for CMRS-ILEC interconnection than did the Commission's earlier interconnection rules and policies. As an initial matter, the Commission's establishment of pricing rules under sections 251 and 252 (even though those rules were stayed for a period of time by the Eighth Circuit) helped CMRS providers take the first steps to reasonable rates. The codification of CMRS providers' status as "co-carriers" and the adoption of rules that specifically prohibit ILECs and the states from discriminating against wireless carriers have facilitated the negotiation and dispute resolution process. The detailed procedural mechanisms and timelines set forth in section 252 (including the "opt-in" provisions of section 252(i)) have helped to reduce transaction costs. Rather than reinventing the wheel and devising a separate interconnection regime for CMRS-ILEC interconnection, AWS urges the Commission to reaffirm the applicability of sections 251 and 252 to CMRS providers and not to forbear from these statutory provisions.[41]

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[40] *See generally CMRS Second Report and Order,* 9 FCC Rcd. 1411, FCC 94-31 at ¶¶ 224-227; *CMRS Interconnection Opinion*, 4 FCC Rcd. 2369.

[41] The *NPRM* also seeks comment on whether the Commission should forbear from applying some or all of section 332 to CMRS providers. Because, as is explained above, section 332 provides the Commission with the

For these reasons, although the current "fifty-state" interconnection approval process is cumbersome, AWS does not now request that the Commission generally preempt the states' role over CMRS-ILEC interconnection under section 252. It is unquestionable that CMRS providers would prefer to have the Commission assume responsibility for overseeing all CMRS-ILEC interconnection agreements. As the *NPRM* correctly deduces, having to negotiate and enforce interconnection rights with each ILEC in fifty different jurisdictions does increase the transaction costs, particularly when, as is often the case, the states are less knowledgeable about issues relating to CMRS providers and their network.[42] Having multiple arbiters of interconnection agreements necessarily leads to some variation in the interconnection terms and conditions from state to state. This in turn increases the cost and complexity for carriers like AWS that have multi-state service areas and operate their businesses on a national basis.

Although continuing state involvement in the CMRS-ILEC process is not ideal, however, AWS has generally been able to find a way to work within the current structure. In addition, AWS recognizes that the Commission does not have the procedural mechanisms in place to approve and, if necessary, arbitrate CMRS-ILEC interconnection agreements. For these reasons, and because AWS believes that there is value in maintaining a relatively uniform system of interconnection, AWS does not now request that the Commission generally preempt the states' role over CMRS-LEC interconnection under section 252. It is critical, nonetheless, that the Commission stand ready to provide binding guidance to the states and other parties regarding the

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(Footnote continued)
authority to adopt rules of special concern to CMRS providers, AWS submits that there is no reason for the Commission to forbear from section 332.

[42] *NPRM* at ¶ 89. For example, AWS recently experienced some significant challenges in getting the Washington Utilities and Transport Commission to understand how its mobile switching center ("MSC") compared with a LEC tandem switch. *See U.S. West v. WUTC*, 255 F.3d 990 .

applicability of its rules and sections 251 and 252 to matters involving CMRS-ILEC interconnection.

C. Bill and Keep Is a Permissible Reciprocal Compensation Scheme Under § 252(d)

Under section 252(d)(2)(A), the terms for reciprocal compensation cannot be considered to be just and reasonable unless "such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination."[43] However, section 252(d)(2)(B) provides that this requirement shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements)." In the *NPRM*, the Commission stated its belief that bill and keep arrangements provide for the mutual and reciprocal recovery of costs even when traffic is not in balance.[44] AWS agrees. The statute does not require that the minutes of traffic on each network be roughly equal but rather that each carrier recover a "reasonable approximation of the additional costs of terminating such calls."[45]

As the Commission is well aware, trying to determine individual carriers' costs for terminating traffic and transporting the traffic is complicated and requires consideration of a number of different factors, including whether each providers' costs for terminating traffic is the same. As is explained in detail below, CMRS providers' costs for terminating their traffic are substantially higher than the ILECs.[46] Thus, even though the ILEC may temporarily terminate more traffic, the costs may be balanced because each minute of CMRS traffic is more expensive

[43] 47 U.S.C. § 252(d)(2)(A).

[44] *NPRM* at ¶ 75.

[45] 47 U.S.C. § 252(d)(a)(A)(ii).

[46] *See* discussion *infra* at Section IV.A.1.

than a minute of ILEC traffic. In the same vein, the Commission postulates that because carriers build their networks to handle peak traffic loading, a minute of traffic sent at a peak hour might cost substantially more to terminate than a minute of traffic terminated at a non-peak hour which might bear little, if any, incremental cost.[47]

Fortunately, however, section 252(d) does not require mathematical precision; it requires recovery of only a "reasonable approximation" of the costs. Thus, the Commission does not have to conduct complicated cost studies of each network; instead it may simply come up with a rough approximation of whether it believes the costs are balanced. In making this determination the Commission may look at trends over time, as well as the causes of any current imbalances and how they might be rectified**.** There is nothing in section 252(d) that requires the Commission to ensure that all costs will be recovered in a particular time period. Applying all of these factors to the case of CMRS-ILEC interconnection, the Commission should find that bill and keep will afford ILECs and CMRS providers a rough approximation of additional costs of terminating end-user traffic.[48]

Even if the Commission were to find that cost recovery was not roughly mutual, section 252(d) would not preclude the establishment of bill and keep. Section 252(d) expressly states that it is not intended to preclude arrangements that afford mutual recovery of costs through the "offsetting of reciprocal obligations." Congress' choice of the word "obligation" rather than "payments" is significant and precludes any argument that the only acceptable method of compensation is carrier-to-carrier payments. Thus, any significant cost disparity may also be addressed consistent with the statute by each carrier's recovery of its costs from the end-user

[47] *NPRM* at ¶¶ 109-110.

[48] *See* discussion *infra* at Section IV.A.2.b.

customer. This is especially true if the call's benefits – and attendant cost causation – apply to both the calling and called parties.[49]

IV. A BILL AND KEEP REGIME FOR LOCAL TRAFFIC

A. The Commission Should Adopt Bill and Keep Compensation for Termination of Local Traffic Exchanged with CMRS Providers

1. Bill and Keep Recognizes That Both the Calling and Called Parties Benefit From, and Should Be Responsible for the Costs of, the Call

Telecommunications is the exchange of information between two or more parties via CMRS or wireline facilities. Regardless of which of those parties initiates that exchange, the telecommunications provider uses the same facilities to enable that exchange—one or more switches (including connections between multiple switches) and connections between each of the parties and those switches. The issue for monopoly telecommunications providers historically has been how regulators should assign responsibility for the costs of those facilities to the parties that are using them. As the Commission observed, the CPNP solution that was developed is the result of assumptions that the monopoly provider would charge for access to its network and that the calling party was the sole cost causer of the call. Traditionally there has been little examination of whether interconnection charges should be assessed or how to address the acknowledged fact that both parties benefit from a call.[50]

The market has fundamentally changed since the days of the former Bell system. Telecommunications is no longer legally restricted to a single provider using copper wires but now also includes a variety of alternative providers that use wireless technologies and fiberoptic transmission facilities to complete calls. As the various telecommunications markets have grown, they have outgrown many of the constraints of a regulated monopoly market. One such

[49] *Id.*

[50] *NPRM* at ¶ 19.

constraint is the universal assumption that the party who originates a telephone call causes the costs of that call and should be charged accordingly. However, the reality is that the need or desire to exchange information "causes" the communication, not the party that initially establishes the connection that enables that exchange.

The emerging telecommunications marketplace has demonstrated the fallacy of cost causation by the party initiating a call. CMRS providers, whose rates are unregulated and who have no monopoly market power, have historically charged customers for *both* making and receiving telephone calls. Toll-free and teleconferencing services have developed which assign the costs of the call to parties other than the party that originates the call from a network perspective. Legislatures and regulators in many states, moreover, have required ILECs to offer local calling at flat monthly rates, which effectively require customers to pay for access to the network without regard to whether they initiate that access.[51] The rationale underlying all of these outcomes is that all parties benefit from the ability to communicate with each other, and the party who initiates the communication should not be solely responsible for its costs.

Despite these developments, the CPNP requirement continues to apply in many circumstances, resulting in market distortions and inefficiencies. One such circumstance is reciprocal compensation for the exchange of local traffic. The Commission is fully aware of the intense controversy generated by the application of reciprocal compensation based on a CPNP rationale in the context of traffic bound for Internet Service Providers ("ISPs"). The ILECs' response to this issue is particularly instructive. The ILECs do not advocate changing the rationale; rather, they would simply make an exception for ISP-bound traffic. Indeed, some

[51] *See, e.g.*, Wash. Rev. Code § 80.04.130(3).

ILECs attempt to rationalize such an exception by claiming that the cost causation characteristics of ISP-bound calls are fundamentally different from any other type of call.

This debate illustrates the perils inherent in basing any regulatory requirements for intercarrier compensation on the outdated concept that the calling party's network causes the cost of telecommunications. Because that assumption does not reflect reality, carriers will continue to have the opportunity and incentive to manipulate regulatory requirements based on that assumption to their economic and competitive advantage. Such regulatory manipulation is all the more likely in a market in which a new entrant's primary supplier of wholesale facilities and services is also the incumbent monopoly retail service provider and the new entrant's primary competitor.

Carriers should recover their costs to originate and terminate traffic from their end user customers, not from each other. Bill and keep imposes just such a requirement. Bill and keep thus removes any incentive to serve particular types of customers—or to avoid serving particular types of customers—solely because those customers have predominantly inbound or outbound calls with a corresponding impact on the carrier's revenues from other carriers. Generating revenues from end user customers rather than other carriers also reduces the opportunity for ILECs to burden the development of effective local competition by imposing unwarranted costs and conditions on competing carriers. Because carriers must recover their network costs from their end user customers, bill and keep provides carriers with an additional market incentive to operate more efficiently and minimize network costs. Customers demand high quality services at lower prices. Bill and keep, by making each carrier responsible for its own network costs, ensures that each carrier is directly responsible to its end user customers for meeting that demand. Bill and keep, therefore, is consistent with mutual cost causation for

telecommunications calls, increases network efficiency, and minimizes network costs and the opportunities and incentives for one competing carrier to use compensation for traffic termination to competitively disadvantage another carrier.

Bill and keep also fosters economic efficiency by reducing carriers' administrative costs. Payment of reciprocal compensation requires that carriers incur significant costs to measure, record, and bill for exchanged traffic. In many cases, moreover, carriers measure the traffic that they both originate and terminate. These carriers thus must reconcile discrepancies in their traffic measurements, generating additional administrative costs. Bill and keep reduces or removes these costs by eliminating the need for carriers to measure, record, and bill every minute of every call made by one carrier's end user customer to the other carrier's end user customer.[52] Bill and keep is also administratively easier from a regulatory perspective, because it eliminates the need for regulators to review among other things, cost studies, rates in interconnection agreements, and intercarrier compensation disputes.

The Commission and some other parties, however, have expressed the concern that implementation of bill and keep would result in its own market distortions of another kind. Rather than create an incentive to serve end users who predominantly *receive* calls from other carriers' subscribers in order to collect revenues from reciprocal compensation, the fear is that some carriers would focus their marketing efforts on customers who *originate* calls to other carriers' subscribers in order to shift the termination costs to the other carriers. No such result would occur. From a theoretical standpoint, such concerns are again based on a CPNP paradigm that the Commission would be eliminating for intercarrier compensation. If a carrier is

[52] Carriers also measure traffic under bill and keep, just as they measure traffic on their own network, in order to ensure that they maintain sufficient facilities to accommodate traffic volumes. Such measurements, however, involve only traffic sampling at peak busy hours and thus are much less extensive—and correspondingly much less costly—than measuring all traffic for reciprocal compensation purposes.

responsible for the costs its customers generate by both making and receiving telecommunications calls, the carrier cannot shift any of its costs to an interconnecting carrier.

The Commission nevertheless suggests that "there may be less of an imperative to apply a new regime to LEC-CMRS interconnection" because the Commission is "not aware of complaints against CMRS providers for excessive termination rates—even in unregulated interconnection arrangements—or for engaging in regulatory arbitrage."[53] The lack of complaints from ILEC*s* about CMRS providers' rates or practices should not determine when the Commission applies a more economically efficient and appropriate form of intercarrier compensation for CMRS-ILEC interconnection. Nor does the relatively few complaints brought by CMRS providers about ILEC access mean that "significant problems do not exist" with LEC-CMRS interconnection.[54] Even with the Commission's rules, ILECs still try to discriminate against CMRS providers and, from AWS' experience, the level and intensity of ILEC abuse will only increase as wireless service becomes more of a competitive threat to landline services. The fact that more complaints have not been filed is more a result of the CMRS industry's decision to focus its resources and energies on growing a business and acquiring and servicing customers in a fiercely competitive marketplace, rather than on fighting regulatory battles. However, as is explained in detail above, CMRS providers are experiencing significant problems in the interconnection area—including some specific problems relating to the levels of termination rates (*e.g.*, rates for indirect compensation). Most of the other problems that CMRS providers are experiencing stem directly from the ILECs' continuing unwillingness to treat CMRS providers in the same manner they treat CLECs and other requesting carriers.[55]

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[53] *NPRM* at ¶ 65.

[54] *Id*.

[55] *See* discussion *infra* Section II.A, II.D.

The wireless industry has fought vigorously to convince Congress and the Commission to require ILECs to provide non-discriminatory interconnection to CMRS providers. The Commission should not depart from that position and once again permit ILECs to discriminate against CMRS providers by declining to apply a new reciprocal compensation regime to CMRS-ILEC interconnection. Such a decision would further embolden the ILECs to discriminate against CMRS providers and would impede the development of wireless alternatives to wireline services. In addition, as is explained in detail in Section VI below, if the Commission chooses to retain the existing CPNP system, it will have to address a number of complicated issues relating to CMRS-ILEC interconnection rates and access charges that it has not reached thus far. AWS, therefore, strongly urges the Commission to apply bill and keep compensation to the traffic exchanged between ILECs and CMRS providers.

2. Specific Circumstances Do Not Undermine the Rationale Supporting Bill and Keep Compensation for Traffic Exchanged Between ILECs and CMRS Providers

The Commission has asked for an explanation of the conditions under which any particular justification for bill and keep applies, specifically if: "(1) only one party to the call benefited from the call; (2) the two interconnected networks had unbalanced traffic; (3) the two networks had dissimilar costs or cost structures (*e.g.,* one network exhibits significant economies of scale); or (4) the two networks offered different qualities of service."[56] The justification for bill and keep between CMRS providers and ILECs applies in all of these circumstances.

a. Single Party Benefit from Call

As discussed above, the fundamental justification for bill and keep compensation between CMRS providers and ILECs is that both parties to a call, rather than just the party

[56] *NPRM* at ¶ 44.

originating the call, benefit from that call and should compensate their service providers accordingly. Obviously, if both parties do not benefit from the call, that justification is inapplicable. Any such circumstances, however, are the exception, rather than the rule, and do not undermine the propriety of bill and keep.

The vast majority of telephone calls—especially those between wireline and CMRS subscribers—benefit both the calling and called parties. The object of the call is communication, and as long as both parties are willing to engage in that communication, both parties receive a benefit. Friends and family benefit from calls to each other regardless of which person originated the call. Information exchanged in calls between consumers and businesses also benefits both parties, as do calls between citizens and local, state, or federal government agencies. The only exception to this general rule would be calls in which one of the parties, usually the recipient, does not want to communicate with the other party. Such calls generally would include misdirected calls, harassing or otherwise unwelcome calls, and some amount of unsolicited calls seeking to sell products and services, obtain survey participation, or request charitable or political contributions.[57] AWS is unaware of any empirical analysis on the percentage of total calls that such unwanted calls represent, but common sense suggests that they do not represent a percentage of total traffic exchanged between CMRS and wireline subscribers sufficiently large to undermine the mutual benefit justification for bill and keep.

Industry marketing and business practices support this common sense view. CMRS providers historically have recovered network costs by charging their customers for all calls,

[57] While unsolicited, at least some of these calls would be welcomed by those interested in purchasing the offered products or services, participating in the survey, or making a contribution. Indeed, no one would make such calls unless at least some recipients were interested.

whether the customer originated or received the call. Customers' willingness to pay those charges supports the assumption that they believe that they generally will benefit from receiving, as well as making, calls. ILEC prices are structured differently but nevertheless are designed to recover most of both originating and terminating costs of the customers' calls. ILECs, particularly those that offer flat-rated local calling, establish prices under both traditional rate of return and price cap regulation often without regard to whether and the extent to which the customer originates or receives calls. Rather, the rates are based on network access as well as company and state commission judgments on the reasonable amount of the company's network costs for which each customer class is responsible.

Both CMRS and wireline carriers have also developed market solutions for the issue of unwanted calls. ILEC customers can obtain telephone numbers that are not listed in directories, and CMRS customers may not have their numbers listed unless they affirmatively request such a listing. Most, if not all, CMRS providers and ILECs offer services, like caller ID, that enable their customers to identify and screen unwanted calls. These services arose in response to customer privacy concerns, but their development and implementation also promote network efficiency by minimizing unwanted calls and their attendant costs. As a result, the vast majority of the calls that are actually completed are beneficial to both parties and, when made between customers of different local providers, amply justify bill and keep compensation.

b. Unbalanced Traffic

The Commission initially endorsed bill and keep only when traffic between interconnected carriers is roughly in balance, based on the assumptions that the calling party causes the costs of the call and each party's obligation to the other would be offset if they were terminating approximately the same amount of traffic. The balance of traffic exchange, however, is irrelevant if the calls' benefits—and attendant cost causation—apply to both of the

calling and called parties. When both of the parties to a call cause its costs, each carrier is responsible for its own costs both to originate and to terminate its customers' calls. As long as a carrier's costs to originate and terminate calls are approximately the same (which generally should be the case), the carrier should be indifferent as to whether it is terminating more traffic than it originates, or vice versa. Traffic balance, therefore, does not impact the rationale of implementing bill and keep for the exchange of traffic between ILECs and CMRS providers.

The Commission nevertheless seeks comment on whether a bill and keep rate structure is consistent with the 1996 Act, even when traffic is not in balance. As is discussed above in greater detail, *see supra* at Section III.C., nothing in section 252(d) precludes the imposition of bill-and-keep even when traffic exchanged between the carriers is not in balance. However, if the Commission remains concerned about the traffic balance issue, AWS urges the Commission to establish a reciprocal compensation approach that reflects the market as it should and would be if regulatory restraints were largely unnecessary, rather than an approach that accommodates the current market as it has developed under past regulatory decisions.

CMRS providers and ILECs serve the same types of customers, yet the traffic exchanged between their networks has historically been unbalanced. At least two factors have contributed to that imbalance: (1) immaturity of the wireless network; and (2) discriminatory and excessive transport and termination rates imposed by the ILECs. As discussed above, the traffic imbalance is abating in conjunction with broader deployment, use, and public acceptance of wireless services, changes in price structures, significant reductions in the transport and termination rates that CMRS providers pay to ILECs, and adoption of the requirement that ILECs compensate CMRS providers for terminating traffic originated on the ILECs' networks. AWS expects this trend to continue until traffic exchanged between CMRS providers and ILECs in most areas is

roughly in balance. Moreover, as is explained above, even if the minutes of traffic are currently unbalanced, the costs are likely more balanced because the CMRS costs are higher than the ILEC costs.

The Commission should establish a reciprocal compensation approach that anticipates and fosters this result, rather than one which perpetuates market inefficiencies and effectively delays or precludes the development of a more competitive market. Such an approach is fully consistent with both the letter and the spirit of the 1996 Act. Congress foresaw a day when all telecommunications markets would be open to effective competition and sought to establish the means by which that vision could become reality. The Commission should do no less.

c. Dissimilar Costs/Cost Structures

The Commission adopted a presumption that the ILECs' costs for transport and termination of local traffic is an appropriate surrogate for the costs the interconnecting carrier incurs to perform the same functions. Bill and keep compensation is consistent with this presumption. The only difference is that rather than requiring each carrier to pay the other the same specific rate, each carrier must "pay" the other the same level of "in kind" compensation. For the most part, CMRS providers have been willing to assume that they incur the same costs to transport and terminate ILEC traffic as the ILEC incurs to transport and terminate CMRS traffic.[58] Under these circumstances, bill and keep thus is fully compensatory for both carriers.

d. Different Quality of Service

The analysis for networks offering different quality of service is the same as the analysis for different network costs and cost structures in the context of CMRS-ILEC interconnection.

[58] If the Commission does not adopt bill and keep for CMRS-ILEC interconnection, however, CMRS providers are unlikely to continue to be willing to assume that their costs for transport and termination are the same as the ILECs' costs.

Each type of carrier offers the same functionality—the ability to make and receive calls—but they provide that functionality differently. As long as each carrier is providing the same level of service to each other as it provides to its own end user customers, bill and keep is fully compensatory.[59]

B. Internetwork Transport Construction and Compensation Should Be Revised for a Bill and Keep Environment

The Commission properly recognized that bill and keep compensation for termination of local traffic—*i.e.*, for use of another carrier's existing network—does not address compensation for the facilities constructed and maintained to exchange that traffic. This issue should be examined from the perspective of both engineering and economic efficiency. CMRS to CMRS contracts, negotiated without regulatory intervention between parties without market power, provide for either equal sharing in the costs of a joint facility or assign engineering and cost responsibility to each party to reach the first switching point on the other party's network. ILECs, in contrast, retain market power because of their bottleneck control over the ubiquitous landline network and have sought, through a variety of means, to disadvantage their competitors through the interconnection arrangement they seek to impose. The Commission needs to reestablish the principle in a bill and keep environment that *both* interconnecting parties share *equal* engineering and financial responsibility for exchanging traffic, including the construction and maintenance of the facilities needed to exchange that traffic.

1. The Commission Should Require Equal Apportionment of the Costs of Constructing and Maintaining Interconnection Facilities

The most obvious facilities issue that arises from a transition to bill and keep is how costs of interconnection facilities should be apportioned between the interconnecting parties. As

[59] If either carrier provides service to the other that is lower in quality than the service it provides its own end user customers, the appropriate response is to improve that service quality to be nondiscriminatory, not make an

discussed above, ILECs historically required that CMRS providers pay the entire cost of the facilities needed to receive traffic from ILEC customers as well as deliver calls to the ILEC for termination to its customers. ILECs continue to resist implementing the Commission's current rules requiring each interconnecting carrier to bear its share of joint facilities costs in proportion to the amount of traffic it sends to the other carrier for termination.[60] The only adjustment needed to the current rules for a bill and keep environment is that each carrier should be responsible for half of those costs.

Interconnection provides a path between the CLEC/CMRS provider switch and the ILEC switch for the exchange of telecommunications traffic. Interconnection agreements generally establish three methods the parties may use to construct this path: (1) the ILEC may primarily construct the facilities, usually at rates, terms, and conditions contained in its access tariff; (2) the CLEC/CMRS provider may construct the facilities; or (3) each party may construct facilities to a negotiated meet point.[61] Consistent with Commission rules,[62] these agreements further provide that each of the interconnecting companies will pay its proportionate share of the costs of interconnection facilities (based on the percent of traffic it originates), at least for those facilities that the ILEC provides in whole or in part.[63]

(Footnote continued)
adjustment in the type or level of reciprocal compensation.

[60] *See*, *e.g.*, In the Matters of TSR Wireless, LLC, v. US West Communications, Inc., FCC 00-194, *Memorandum Opinion and Order*, 15 FCC Rcd. 11166 (2000).

[61] *E.g.*, Qwest Statement of Generally Available Terms ("SGAT") § 7.1.2; SBC T2A Interconnection Agreement, Attachment 11, Network Interconnection Architecture, Section 1.1.

[62] 47 C.F.R. §§ 51.701-711.

[63] *E.g.,* SGAT at §§ 7.1.2.1, 7.1.2.3 & 7.3.1.1; *see also id.* at § 7.3.2 (cost sharing for Direct Trunked Transport). A continuing dispute exists with respect to the ILEC's obligation to pay its proportionate share of the interconnection facilities provided by the CLEC or CMRS provider. Qwest's SGAT, for example, does not require that Qwest pay its proportionate share of the costs of interconnection facilities that the CLEC constructs (other than Direct Trunked Transport between Qwest wire centers). *Id.* at § 7.3.1.2.

Implementation of a bill and keep compensation mechanism for the exchange of local traffic should retain the three options for constructing interconnection pathways but should require each party to be responsible for one half of the efficient, forward-looking costs, similar to the concept proposed by Atkinson-Barnekov.[64] The economic efficiencies supporting an equal division of the costs of interconnection facilities parallels the analysis supporting bill and keep for terminating traffic. As discussed above, both the calling and called parties benefit from a call in the vast majority of cases, and the originating and terminating carriers are equally responsible for carrying that call. Under those circumstances, the carriers should equally share the costs of constructing and maintaining jointly used facilities to carry that call.[65]

The other two alternatives the Commission proposed—CPNP for transport (DeGraba) and traffic sharing in proportion to balance of traffic[66]—are inconsistent with this rationale and with the basic concept of bill and keep compensation. Requiring carriers to share the costs of transport in proportion to the balance of traffic would require parties to continue to measure the local traffic they exchange to determine their proportion of transport costs. Such an approach, at a minimum, would thus reduce the efficiency of the bill and keep regime by continuing to require traffic measurement and accounting. Requiring the calling party's carrier to be responsible for the costs of transporting the call to the called party's central office suffers from the same deficiencies. In addition, it appears to require the CMRS provider, when originating traffic, to pay transport costs not just to the ILEC tandem but also to the subtending end offices

[64] *See NPRM* at ¶ 46.

[65] Such an arrangement also is competitively neutral and would address anticompetitive actions of ILECs. Currently, for example, BellSouth takes the position that the nonrecurring costs for *shared two-way* facilities between a CMRS provider's switching centers and the ILEC's switch should be paid 100% by the interconnecting carrier, and requires carriers to agree to such a provision in BellSouth's standard interconnection agreement offering. Such an arrangement however is clearly unfair and burdensome for competitive carriers.

[66] *NPRM* at ¶ 46.

for all calls. Such interoffice transport has been included in the per-minute of use rate, at least when traffic volumes do not justify direct trunking to the end office. The CMRS provider, as a result, would incur significantly greater costs to deliver traffic to the ILEC for termination than the ILEC would incur to deliver traffic to the CMRS provider's far fewer mobile switching centers ("MSCs"). This approach, therefore, would be inconsistent with existing Commission rules,[67] as well as with economic efficiency and competitive and technological neutrality.

Equal, rather than proportional, cost-sharing for interconnection facilities is fully consistent with the economic efficiencies and the rationale supporting bill and keep for call termination. Such cost sharing, moreover, would have no impact on interconnection facility engineering, including the determination of which carrier actually constructs and maintains those facilities. That decision is based not on relative compensation levels but on an engineering evaluation of which carrier is better able to construct the facilities most efficiently. CMRS providers must generally obtain interconnection facilities from the ILECs because the ubiquity of the ILEC's network and its monopoly control over that network eliminate other meaningful choices. Cost sharing percentages have no impact on that evaluation. Indeed, CMRS providers ordered interconnection facilities from the ILECs before the ILECs were required to share *any* of those costs. From both an economic and engineering perspective, therefore, both interconnecting carriers should equally share the costs of constructing and maintaining the facilities over which they exchange traffic.

The sole exception to this general rule is indirect interconnection, or "transit" traffic. Transit traffic originates on one carrier's network and passes through an intermediate carrier's

[67] 47 C.F.R. § 51.711(a)(3). Also, as the Ninth Circuit Court of Appeals recently verified, MSCs are the equivalent of an ILEC tandem and entitled to similar treatment with respect to reciprocal compensation. *See US West v. WUTC*, 255 F.3d 990. A requirement that a CMRS provider pay for transport to the ILEC end office while

network before being terminated by the interconnecting carrier. The most common such scenario is traffic exchanged between a CMRS provider and a small independent ILEC (or CLEC) that transits the network of the largest ILEC (generally the Bell Operating Company or "BOC"). Again, such network architecture is the result of economic and engineering efficiencies, usually in situations in which the originating and terminating carriers do not exchange a sufficient level of traffic to justify constructing dedicated facilities between their networks. The transiting carrier, in effect, constructs and maintains the interconnection facilities between the other two carriers, but the transiting carrier does not have an end-user customer from which it can seek compensation for providing those facilities. The originating and terminating carriers, however, should nevertheless share the efficient, forward-looking costs incurred by the transiting carrier – just as they would for other forms of transport.

Under these limited circumstances, the transiting carrier should be compensated by both indirectly interconnected carriers for providing the transiting function (unless the transiting carrier has constructed a dedicated facility between the other two carriers). The originating and terminating carriers should share the total transit costs equally, as they would if dedicated facilities were in place. The Commission, therefore, should authorize the transiting carrier to bill both the originating carrier and the terminating carrier for one half of the forward-looking and efficiently incurred costs to transit the traffic exchanged between those carriers. Regardless of which of the two interconnecting carriers (or an ILEC third carrier) provides the interconnection facilities, the Commission should continue to regulate the rates for those facilities.

(Footnote continued)
the ILEC pays for transport only to the MSC effectively treats the MSC as the equivalent of an ILEC end office in contravention of existing federal law.

Transport—whether provided as an unbundled network element or as a component of interconnection facilities—should be priced consistently, and market forces are not sufficiently developed to ensure such consistent pricing. Theoretically, the ability of a competitor to construct the interconnection facilities should provide an incentive for the ILEC to keep its prices close to cost, especially if the ILEC must pay half of the costs incurred by another carrier to construct the facilities. As a practical matter, however, the incentive is imperfect at best, particularly for CMRS providers, whose costs to construct landline facilities could exceed the costs the ILEC incurs to construct and maintain interconnection facilities,[68] leaving the ILEC with more than ample opportunity to impose super normal prices.[69] The Commission, therefore, should continue to regulate such transport pricing, at least until such time as competitors' transport networks approach the ubiquitous reach of the ILECs' networks.

2. The Commission Should Ensure That POI Determination Continues to Be Efficient

The other set of interconnection facilities issues arising out of implementation of a bill and keep compensation system is the number and location of points of interconnection ("POIs") between carriers' networks. The Commission seeks comment on several such issues, including whether the Commission should continue to require CLECs (and CMRS providers) to designate no more than a single POI per LATA for interconnection,[70] and how carriers should select and compensate each other for POIs in a bill and keep environment. Again, carriers largely have

[68] The CMRS provider, unlike the ILEC, does not already own an extensive landline network paid for by monopoly ratepayers and thus would not benefit from the economies of scope and scale enjoyed by other carriers whose construction of interconnection facilities will not be the sole purpose of their landline network construction.

[69] Nor does cost sharing of interconnection facilities provide any incentive for the ILEC to minimize its interconnection facility prices. Regardless of the percentage of costs shared, the higher the total cost, the larger the amount the non-constructing carrier must pay. If the ILEC charges twice its costs, for example, the CMRS provider actually would be paying the entire cost of the interconnection facilities, even though theoretically it is paying only for half of those costs.

[70] *NPRM* at ¶ 72; 47 C.F.R. § 51.321.

addressed these issues in their interconnection agreements; the implementation of bill and keep compensation should not alter that resolution.

In a bill and keep environment, the Commission should continue to strive to establish default interconnection requirements that guard against abuses based on market power or other market distortions and that reduce transaction costs and the need for regulatory intervention while leaving room for legitimate negotiations of alternative arrangements. The Commission's minimum requirement of a single POI per LATA recognized that a competitor entering a market may not generate sufficient traffic exchanged with the ILEC to justify the expense of interconnection facilities to multiple POIs. That concern is no less valid when termination of that traffic is subject to bill and keep and interconnection facilities costs are shared equally among the interconnecting carriers.

In the NPRM, the Commission also asked a number of questions about how to address the allocation of costs for transport to single, distant POIs, *i.e.,* those outside the calling area.[71] This is less of an issue for CMRS providers given the size of their local calling areas and the fact that they generally have traffic volumes that justify more than a single distant POI. Nevertheless, if the Commission adopts a rule that requires carriers to equally split the cost of transport, the Commission need not adopt a special rule for distant POIs. So long as the Commission continues to require carriers to establish at least one POI per LATA, the requirement that carriers split the cost of transport to a POI should minimize the incentives of any carrier for establishing a POI in an inefficient location since the carrier will have to pay half the cost to transport calls to that POI.

[71] *NPRM* at ¶ 72.

Accordingly, multiple POIs should be required only when justified by the volume of traffic to be exchanged, and even then, multiple POIs should be required only pursuant to engineering based provisions agreed to by both parties in an interconnection agreement. Parties to interconnection agreements have already recognized and implemented this concept. Standard interconnection contract provisions, for example, require direct trunking between a competitor's switch and an ILEC's end office when traffic reaching the level of a DS-1 circuit is exchanged between customers served by that competitor's switch and customers served by the ILEC's end office at the peak busy hour.[72] State commissions have occasionally required carriers to incorporate this concept as part of an ILEC's single POI per LATA service offering when justified by engineering or economic decisions.[73] Such a requirement minimizes costs and maximizes efficiencies for both parties. The ILECs cannot create an insurmountable barrier to entry into the local exchange market by insisting on unnecessary multiple POIs, while competitors do not abuse a single POI per LATA when traffic volumes would be handled more efficiently using direct trunks to multiple POIs.

CMRS providers' experience exemplifies the wisdom of this approach. CMRS networks in many parts of the country are already relatively mature, with coverage to ubiquitous locations within a geographic area. As traffic volumes have increased, CMRS providers have deployed additional switches and created additional POIs. AWS, for example, uses both Type 2A (tandem) and Type 2B (end office) interconnection pursuant to its interconnection agreements with ILECs to exchange traffic most efficiently according to the traffic volumes in particular

[72] *E.g.*, Qwest SGAT § 7.2.2.1.3.

[73] *In re Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271*, Docket Nos. UT-003022 & UT-003040, Fifteenth Supp. Order paras. 8 & 24-26 (Wash. Utils. & Transp. Comm'n Aug. 17, 2001) (adopting and clarifying initial order findings and conclusions requiring SGAT language to require direct trunking to local tandems or end offices, rather than delivering the traffic to the access tandem, when traffic specific to the areas served by those tandems or end offices reach the level of a DS-1).

areas. AWS prefers to minimize its reliance on the ILECs' networks not just to comply with its interconnection agreements and efficient network management but also to maximize usage of its own network facilities in order to ensure service quality. Multiple connections also provide redundancy and avoid blockage problems that can degrade the customer's quality of service. Bill and keep compensation, including equal cost sharing for interconnection facilities, has no impact on these factors.

When parties agree to establish multiple POIs, however, the Commission should make clear that the facilities constructed at each POI accommodate *all* traffic exchanged between both parties, *i.e.*, include "two-way" trunks. Some ILECs have been willing to install two-way facilities only at the initial POI and insist that trunking at additional POIs be one-way—from the CMRS provider to the ILEC—at the CMRS provider's sole expense. This practice increases CMRS providers' costs not only to deliver traffic to the ILEC for termination, but also to terminate traffic delivered by the ILEC at the initial POI by requiring the CMRS provider to use more of its network to "back haul" the ILEC's traffic. Equal cost sharing of all facilities would help mitigate this practice—if an ILEC is paying for half of a facility, it is more likely to use it to deliver traffic to the CMRS provider over that facility. The Commission, however, should ensure that ILECs do not refuse to establish efficient interconnection, including two-way trunks at each POI, for anti-competitive purposes and should also establish a presumption that all interconnect transport facilities between networks are two-way absent agreement to the contrary.

If parties establish multiple POIs, the Commission should clarify that the terminating carrier should be able to designate the routing of traffic to a specific POI so that the originating carrier does not deliver traffic to certain points on the network that may create network or traffic problems. Allowing the terminating carrier to choose the POI to which calls should be delivered

not only promotes engineering and network reliability, but also ensures that the originating carrier does not deliver traffic in ways that might be less cost-efficient. Moreover, because under AWS' proposal a terminating carrier shares in the costs of transport, it will have as much incentive as the originating carrier to have traffic delivered to the most economical and technically reliable POI.

3. The Commission Should Establish Default Standards for Interconnection Facility Construction and Cost Apportionment

The Commission should establish rules governing construction of interconnection facilities and equal apportionment of the costs of those facilities that would apply in the absence of parties' negotiated agreements to the contrary. Default rules will establish the framework for economically and efficient interconnection in a bill and keep environment. Equally important, such rules will clarify the ILECs' obligations with respect to interconnection facilities.

Consistent with the discussion above, the Commission should adopt rules incorporating the following requirements:

(a) CMRS providers or CLECs should be required to establish no more than one POI per LATA with the ILEC, but either interconnecting party may require additional POIs if traffic volumes justify those POIs;[74]

(b) When CMRS providers/CLECs establish multiple POIs with the ILEC, the parties are equally responsible for constructing and maintaining the required facilities to the POI and must establish two-way facilities at each POI;

(c) The ILEC and the CMRS provider/CLEC are equally responsible for one half of the efficient, forward-looking costs of the interconnection facilities at each POI,

[74] An exception may exist where ILECs have permission to cross LATA boundaries and MTAs include more than one LATA. In that circumstance, the rule should require one POI per MTA.

regardless of whether one party or a third party actually constructs and maintains those facilities; and

(d) A transiting carrier may charge only one half of its TELRIC-based costs of transport to the carrier that originates calls to a third carrier for termination and one half of those costs to the terminating carrier.

V. THE COMMISSION SHOULD ADOPT BILL AND KEEP FOR INTERSTATE ACCESS CHARGES

The Commission requests comment on whether it should in the long term adopt a bill and keep rule for intercarrier arrangements that currently are subject to access charges and if so, whether it should attempt to apply such a rule to all carriers at the same time or whether it should gradually move toward bill and keep in phases.[75] As discussed above, AWS fully supports a bill and keep regime as the most efficient and pro-competitive method of intercarrier compensation. Further, AWS urges the Commission to implement such a system on *all* carrier relationships, in order to minimize further market distortions and inequities. The Commission has recognized on numerous occasions that the transport and termination of traffic involves the same network functions whether it originated locally or from a distant exchange—and that the rates for transport and termination of local and long distance traffic should converge.[76] If the Commission concludes, however, that the access charge system should evolve toward bill and keep on a gradual or staggered basis, AWS urges the Commission to apply bill and keep rules immediately without further delay to all CMRS traffic—both intra-MTA and inter-MTA —in light of the inequities that the current access charge system imposes on CMRS providers.

[75] *NPRM* at ¶ 97.

[76] *Local Competition Order* at ¶ 1033.

In order to preserve the current interstate access charge system pursuant to 251(g) and to mirror the rule for CMRS providers, the Commission decided in the *Local Competition Order* to maintain the status quo for access charges for CMRS providers and thus to apply access charge rules for non-local CMRS traffic and to adopt reciprocal compensation requirements for local CMRS traffic.[77] Because the local calling area for CMRS providers was not defined, the Commission defined it as the major trading area ("MTA"), one of the larger Commission authorized wireless license areas.[78] Therefore, traffic that travels to or from a CMRS network and "that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), *rather than interstate and intrastate access charges*."[79]

The Commission, however, failed to fully clarify in the *Local Competition Order* how its then current access charge regime for CMRS providers should be harmonized with its new MTA rules when traffic is "local" or long distance.[80] For example, the Commission noted in the *Local Competition Order* that "most traffic between LECs and CMRS providers is not subject to interstate access charges *unless it is carried by an IXC*, *with the exception of certain interstate interexchange service provided by CMRS carriers*, such as some 'roaming' traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges."[81] Subsequently, however, the Commission clarified and emphasized that all "CMRS traffic within a major trading area . . . is not 'interexchange' traffic," and even CMRS calls "within an MTA

[77] *Local Competition Order* at ¶¶ 1041, 1043.

[78] *Local Competition Order* at ¶¶ 1036, 1045. *See also* Rand McNally, Inc., *Commercial Atlas and Marketing Guide* (1992). MTAs are CMRS providers' license areas, and "in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs' local service areas."

[79] *Local Competition Order* at ¶ 1036 (emphasis added).

[80] In addition, perhaps because of time constraints in the 1996 Act, the Commission never examined the problems with the unclear and unworkable current access charge regime then in effect for CMRS providers.

[81] *Local Competition Order* at ¶ 1043 (emphasis added).

that would be interstate will *not be treated as interexchange*."[82] Despite the Commission's clarifications, some carriers have improperly refused to treat intra-MTA CMRS traffic as "local" and not long distance. For example, some carriers such as independent ILECs have imposed access charges on CMRS traffic where the traffic transits another carrier's network, such as an IXC, even though the traffic is within an MTA.

The current access charge regime has also resulted in various market distortions and inequities for CMRS providers, with CMRS providers currently collecting no access charges (or any other compensation) on CMRS-originated traffic that is inter-MTA, while LECs impose access charges on this same type of traffic traveling to CMRS providers. The Commission's rules have resulted in the following compensation schemes for three types of CMRS inter-MTA traffic arrangements:

- Directly from an IXC: In the case of direct interconnection between an interexchange carrier ("IXC") and a CMRS provider, the IXC usually pays nothing (neither access charges nor reciprocal compensation) to the CMRS provider to terminate its calls. The CMRS provider pays the IXC a per-minute rate for its long distance service. Under this scenario, the CMRS provider is not compensated for providing a termination function for the use of its network, and the IXC avoids access charges.
- Directly from an ILEC: The volume of inter-MTA traffic generated on the ILEC network is extremely small. When the ILEC terminates such traffic to a CMRS provider, the CMRS provider generally pays access charges to the ILEC.

[82] *See* Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; Petitions for Forbearance, CC Docket No.96-61, *Memorandum Opinion and Order*, FCC 98-347, 14 FCC Rcd. 391 at ¶¶ 2, 23 (1998) (emphasis added).

However, because it is difficult to measure inter- versus intra-MTA traffic, carriers usually just approximate this based on a percentage allotment (*e.g.*, 2%.).

- From an IXC, through an ILEC: Under arrangements where traffic passes from an ILEC to an IXC to an ILEC to the CMRS provider, the originating ILEC receives originating access charges from the IXC and the terminating ILEC receives terminating access from the IXC. The CMRS provider receives no access charges or any other compensation for this call.

Under each of these scenarios, there is a major inequity and asymmetry: the CMRS provider receives no compensation, but pays access charges, while the other carriers receive access charges for the termination of such traffic, or otherwise benefit by transferring traffic to the CMRS provider.

In addition to addressing the inequities and confusion resulting from the current access charge system, a bill and keep system results in other benefits that militate in favor of its adoption. These benefits include: administrative simplicity, architectural and technological neutrality, reduction of economic barriers to entry, and economic efficiency.[83] Accordingly, a bill and keep system is the most equitable and efficient system for intercarrier compensation of all types including access charges.

Although CMRS providers have understood that the Commission faced difficulties in overhauling the access charge regime in 1996 and therefore preserved the status quo for CMRS providers at that time, CMRS providers now have endured more than five years of an inequitable access charge regime. It is past time for the Commission to act in reforming the access charge system for CMRS traffic. Given the multitude of conflicting and inequitable ways in which

[83] *Local Competition Order* at ¶ 1101.

access charges have been applied to CMRS traffic, the Commission should expeditiously apply bill and keep to access charges for this type of traffic as well as all other types of intercarrier compensation. Therefore, AWS urges the Commission to modify the existing access charge system to bill and keep for *all* types of traffic (both inter- and intra-MTA) for all types of carriers: ILECs, CLECs, IXCs, and CMRS providers. Otherwise, regulatory arbitrage and market distortions might result from different forms of intercarrier compensation for different types of traffic.

In the alternative, if the Commission wishes to pursue a gradual staggered approach to implementing bill and keep, the Commission should first impose bill and keep on CMRS traffic (*i.e.*, traffic originated or terminated on CMRS networks). As demonstrated above, the existing access charge system imposes some unique inequities and distortions on CMRS traffic. The Commission has plenary authority over CMRS-LEC interconnection pursuant to section 332 and should accordingly exercise its jurisdiction by implementing bill and keep for all CMRS traffic, including that currently subject to access charges.

VI. MODIFYING THE EXISTING CPNP SYSTEM

The Commission seeks comment on how the existing CPNP system can be reformed in the event that it determines *not* to adopt bill and keep.[84] As emphasized throughout these comments, AWS believes that bill and keep will best promote the Commission's goals of an efficient system that promotes competition and "minimizes the need for regulatory intervention,"[85] because among other things, bill and keep accurately reflects that both calling

[84] *NPRM* at ¶ 98.

[85] *See NPRM* at ¶ 2.

and called parties benefit from a telephone call; is technologically and competitively neutral; and provides less opportunity for arbitrage and regulatory distortions.

If, however, the Commission declines to adopt a unified and cohesive bill and keep regime for all carriers at this time, the Commission should take this opportunity to address a host of existing inefficiencies and inequities under the current CPNP system. As explained above in Section II.D, the current system has led to significant problems. In some cases, these problems can be resolved by the Commission simply reaffirming or clarifying its existing rules in order to ensure that these rules are adequately followed. In other cases, the Commission needs to adopt new rules or make modifications to the existing system. Specifically, AWS requests that the Commission:

(1) Address the growing problems with some independent ILECs' refusal to comply with reciprocal compensation rules, by clarifying that reciprocal compensation (or in the alternative, bill and keep where there is a *de minimus* level of traffic) applies to the termination of intra-MTA traffic regardless of whether such traffic is passed indirectly or directly;

(2) Reaffirm that reciprocal compensation rates should be based on TELRIC with a presumption of symmetrical rates (including the tandem-switch rate compensation rule), subject to the right of competing carriers to demonstrate higher costs;

(3) Reaffirm that the ILEC must permit the interconnecting carrier to choose POIs within the LATA as long as it is technically feasible, and revise the current rules to require that carriers equally divide the costs of transport to a POI, while allowing the terminating carrier to choose the routing of traffic to a POI;

(4) Affirm that virtual NXX codes can be used by competitive carriers without paying additional costs for transport; and

(5) Reaffirm that CMRS providers possess the same rights that CLECs have under sections 251 and 252 to obtain UNEs, equivalent service quality, and interconnection terms and conditions from ILECs so that CMRS providers may, among other things, opt into part or all of other carriers' interconnection agreements, and obtain transport at TELRIC rates and on a nondiscriminatory basis.

A. The Commission Should Require Reciprocal Compensation or Bill and Keep for Intra-MTA Traffic, Including Traffic That Is Passed Indirectly Through a Transiting Carrier

A substantial inequity of the CPNP system currently involves transit traffic that originates with the CMRS provider, transits through an intermediate carrier's network (typically a large ILEC) to the independent ILEC that terminates the call to its end-user customer. Consistent with the Commission's requirements, traffic that originates and terminates within an MTA is "local," yet in some cases the independent ILECs have sought to impose access charges or unreasonable non-cost based charges on this traffic, while refusing to pay reciprocal compensation where appropriate. In order to address these issues, the Commission should reaffirm its rule that reciprocal compensation applies to <u>all</u> intra-MTA CMRS traffic. Further, in light of the transactional and administrative costs associated with billing for intra-MTA CMRS traffic, the Commission should adopt a bill and keep exception for carriers passing *de minimus* amounts of this type of traffic.

As noted above, independent ILECs have essentially sought to escape the requirements of the 1996 Act by asserting that they owe no obligations to CMRS providers with which they are not directly connected. Specifically, these independent ILECs attempt to impose access charges

and other non-TELRIC charges on intra-MTA traffic under the theory that the Commission's intra-MTA reciprocal compensation rule does not apply if another ILEC or carrier transits calls between the independent carrier and the CMRS provider. Independent ILECs also claim they owe no reciprocal compensation payments to CMRS providers even where such traffic is intra-MTA, if the calls are passed to the CMRS providers through another carriers' network (particularly when the transiting carrier is an IXC).

The Commission should address this growing problem in this proceeding if it determines to maintain the CPNP system. Under the Commission's rules, reciprocal compensation applies to all calls originating and terminating within a local calling area, which for CMRS providers has been determined to be the MTA.[86] Nowhere did the Commission create an exception for intra-MTA traffic that transits another carrier's network. Thus, if the Commission maintains CPNP, it should reaffirm that all intra-MTA traffic (regardless of whether passed through indirect interconnection or direct interconnection, and regardless of the identity of the carrier who transits the traffic, *i.e.*, LEC or IXC) is subject to forward-looking cost-based reciprocal compensation payments by the originating carrier, and not access or non-cost based charges.[87]

Further, given the inherent costs and burdens associated with negotiating interconnection agreements (even when there is no dispute about the compensation rate), AWS urges the Commission to consider a *de minimus* exception to compensation for this traffic. Specifically, if it determines to maintain a CPNP system, the Commission should adopt a bill and keep exception for carriers that route a *de minimus* amount of intra-MTA traffic through indirect interconnection to each other. It is neither reasonable nor cost-efficient for CMRS providers

[86] *See Local Competition Order* at ¶ 1036.

[87] In fact, there is no reason why such traffic should not be subject to bill and keep compensation similar to the reciprocal compensation arrangements that CMRS providers have negotiated with each other. *See* discussion *supra* at Section II.D.

transferring a *de minimus* amount of traffic to independent ILECs to engage in protracted negotiations with these carriers for dollar amounts that are often negligible.

B. Rate Level Issues—The Commission Should Reaffirm TELRIC and Symmetrical Rate Regulation, Subject to the Right of Competitive Carriers to Receive Higher Cost-Based Termination Rates

In the event that the Commission determines to maintain CPNP, AWS urges the Commission to reaffirm its commitment to forward-looking cost structures. Moreover, if the Commission determines to continue with the CPNP system, it should reaffirm its current rule allowing individual interconnecting carriers to demonstrate that their individual costs of transport and termination are higher than the ILEC's costs,[88] so that such higher costs of competitive carriers are properly reflected. Finally, the Commission should reaffirm the requirement contained in 47 C.F.R. § 51.711 that interconnecting carriers are entitled to the ILEC's tandem-switch rate for use of new technologies that perform switching for a comparable geographic area as the ILEC's tandem switch.

Currently, the additional costs of termination are low and continue to decrease, suggesting that bill and keep is the most efficient system to adopt. If the Commission nonetheless maintains CPNP, it should at the very least ensure that carriers are not allowed to charge costs in excess of the minimal additional costs of termination because such charges would be inefficient and anti-competitive. AWS thus urges the Commission to reaffirm that a forward-looking cost methodology based on TELRIC principles should be applied to determining costs of termination.[89] The Commission should continue to require costs of termination to reflect

[88] *See Local Competition Order* at ¶ 1089 (noting that if a competitive local provider believes that its costs are greater than those of the ILEC for transport and termination, "it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate.")

[89] TELRIC methodology requires that costs be calculated based on the least-cost, most efficient network configuration and technology currently available, and is the most pro-competitive because it does not include historical or embedded costs of an ILEC's network.

TELRIC, and reaffirm its decision that "termination rates should include an allocation of forward-looking common costs that is no greater proportionally than that allocated to unbundled local loops, which . . . should be relatively low" so that "rates for reciprocal compensation make possible efficient competitive entry."[90]

The Commission further correctly noted in its *NPRM* that ILECs particularly may have incentive to engage in a predatory price squeeze to discriminate in favor of their long-distance affiliates, where access charges exceed economic cost.[91] Thus, access charges as well as termination charges should be based on TELRIC. As the Commission recognized in the *Local Competition Order*, the TELRIC principle "simulates the conditions in a competitive marketplace," and allows carriers "to produce efficiently and compete effectively, which should drive retail prices to their competitive levels."[92]

Moreover, a presumption of symmetrical rates for reciprocal compensation is essential for a competitive environment. The Commission correctly concluded in the *Local Competition Order* that using the ILEC's forward-looking costs for transport and termination as a proxy for costs incurred by interconnecting carriers meets the requirements of section 252(d)(2) that costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls."[93] Specifically, the Commission properly anticipated in the *Local Competition Order* that symmetrical rates will prevent an ILEC from using its bargaining power "to negotiate

[90] *Local Competition Order* at ¶ 1058.

[91] *NPRM* at ¶ 15.

[92] *Local Competition Order* at ¶ 679.

[93] *Id.* at ¶ 1085. Also, 47 C.F.R. § 51.711(a) defines "symmetrical" as "rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services."

excessively high termination rates that competitors pay the ILEC and excessively low termination rates that the ILEC pays interconnecting carriers."[94]

Although AWS believes that a presumption of symmetrical rates is critical, if the Commission determines to maintain CPNP, it should reaffirm its current rules that permit competing carriers to demonstrate that they use technologies or networks that are more expensive than the ILECs' networks or technologies and thus are entitled to greater rates than the ILECs' TELRIC rates.[95] To ensure that the costs of the calling party's network are truly incorporated into the CPNP system, competitive carriers, including CMRS providers, should be able to recover the additional costs. Given that the goal of the CPNP system is to compensate the calling party's network, prohibiting an individual carrier from demonstrating that its individual TELRIC-based rates are greater than the ILEC's TELRIC-network rates would be antithetical to CPNP principles.

Finally, AWS agrees with the Commission that its rules at 47 C.F.R. § 51.711(a)(3) are clear that an interconnecting carrier should receive the ILEC tandem-switch rates for the interconnecting carrier's use of new switch technologies that cover the same geographic region as the incumbent LEC's tandem switch.[96] The Ninth Circuit recently affirmed the Commission's rule, concluding that AWS was entitled to the tandem-switch rate when it terminated traffic at its mobile switching centers, which cover a comparable geographic region as the ILEC's tandem switch.[97]

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[94] *Local Competition Order* at ¶ 1087. For example, an egregious ILEC abuse that the Commission observed in the *Local Competition Order* is that ILECs had charged asymmetrical rates for CMRS providers. *Id.*

[95] *See* 47 C.F.R. §§ 51.707, 51.711; *see also NPRM* at ¶ 104.

[96] *See NPRM* at ¶ 105 (explaining that 47 C.F.R. § 51.711(a)(3) "is clear in requiring only a geographic area test").

[97] *US West v. WUTC*, 255 F.3d 990.

This presumption of symmetrical tandem-switch rates for carriers serving the same geographic region as the ILEC tandem switch does not create opportunities for regulatory arbitrage; instead it facilitates the development of competition.[98] The Commission properly observed in the *NPRM* that disallowing new entrants from collecting symmetrical rates for tandem switching for a geographic area comparable to that served by the ILEC's tandem switch would be anti-competitive and disadvantage new entrants, because new entrants typically have fewer tandems than the incumbent carriers.[99] The Ninth Circuit recognized in *US West v. WUTC* that "[p]enalizing AT&T for its efficiently configured network architecture defeats the letter of § 252(d)(2)(A) and the spirit of the Act by eliminating any incentive to make economically efficient interconnection decisions."[100] Finally, the geographic region test allows new entrants to use technologies that are more efficient than the ILEC's, without requiring them to exactly mirror the ILEC's network, and thus there is no need to amend the current rule to include additional requirements, such as the "functional equivalency" concept.[101]

In conclusion, AWS strongly urges the Commission to reaffirm its conclusions in the *Local Competition Order* that rate compensation based on TELRIC provides the most efficient and pro-competitive manner for intercarrier compensation. Further, the Commission should reaffirm both its symmetrical reciprocal rate presumption while allowing each CLEC or CMRS provider to demonstrate its individual costs of the network; and its rules allowing each CLEC or

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[98] *See NPRM* at ¶ 107.

[99] *Id.*

[100] *US West v. WUTC*, 255 F.3d 990 (*citing Local Competition Order* at ¶ 209).

[101] Although the Commission noted in the *Local Competition Order* that states might *also* consider "functional equivalency" in determining whether to allow the same ILEC transport and termination rate for an interconnecting carrier's use of new technologies, the irrefutable presumption is that the same ILEC tandem-switch rate should be charged by the interconnecting carrier when it uses a switch serving a geographic area comparable to the ILEC's tandem switch. *Local Competition Order* at ¶ 1090.

CMRS provider to obtain the tandem-switch rate for using new technologies that serve a geographic area comparable to that served by the ILEC's tandem switch.

C. The Commission Should Reaffirm its Rules Requiring ILECs to Establish Efficient POIs and Should Establish New Rules Regarding Transport Costs and Delivery of Traffic

In Section IV.B above, AWS explained that in a bill and keep environment the Commission should:

(i) Retain its existing rules requiring that an ILEC permit a requesting telecommunications carrier to interconnect at any technically feasible point within a LATA, including a single POI within a LATA;[102]

(ii) Modify its existing rules to require two-way trunking to the POI, with each carrier bearing half the costs of transport in order to maximize the parties' incentives for efficient network interconnection;[103] and

(iii) Require that, where there is more than a single POI within a LATA, the originating carrier must deliver traffic to the designated point chosen by the terminating carrier.

However, even if the Commission were to maintain the current CPNP system, it should make these changes to the rules. Regardless of the compensation regime, adopting these recommendations would provide the correct incentives to both the originating and terminating carriers to establish efficient POIs and would also promote competition.

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[102] *See NPRM* at ¶ 112; *see also* In the Matter of Application by SBC Communications Inc. to Provide In-Region InterLATA Services in Texas, CC Docket No.00-65, *Memorandum Opinion and Order*, 15 FCC Rcd. 18354, FCC 00-238 at ¶ 78 n.174 (2000) ("*SBC-Texas 271 Order*"); 47 C.F.R. § 51.321. The interconnecting carrier is free to choose more than one POI per LATA as well, as long as it is technically feasible.

[103] The Commission should of course permit individual carriers to negotiate different arrangements than these rules, and carriers should submit disputes for arbitration or resolution.

D. The Commission Should Affirm That All Carriers May Use Virtual NXXs Without Additional Charge

The Commission should further reaffirm that all carriers may use virtual central office codes without having to pay additional charges for such codes. As the Commission notes, virtual NXXs are codes that correspond with a particular geographic area, but are assigned to a customer located in a different geographic area.[104] ILECs complain that CLECs use virtual NXXs to avoid access charges and to collect improper reciprocal compensation payments.[105] The ILEC complaints regarding these virtual NXXs are overstated. If, however, the Commission were to decide to impose certain compensation rules on carriers using virtual NXXs, it should refrain from applying those rules to CMRS providers. Because of the mobile nature of CMRS, there is necessarily little correlation between the virtual NXXs' geographic area and the mobile customer's actual location.

Although some ILECs have complained that they lose transport or toll charges when a carrier uses a virtual NXX, the Commission should reject such arguments. First, even in the landline network, there is not necessarily a precise correlation between where a customer is located and the virtual NXX that is assigned to that customer.[106] Further, the ILECs' complaints that they are losing toll revenues by transporting these calls to locations other than the "rating point" of the called party are undocumented and likely exaggerated.[107]

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[104] *See NPRM* at ¶ 115, n.188.

[105] *See e.g.,* BellSouth *ex parte*, CC Docket Nos. 96-98, 99-68 (Nov. 7, 2000).

[106] Historically there may have been a relationship between rating and routing points. Traditionally, one carrier provided both originating and terminating functions within a LATA, so that an ILEC would switch the call at the end office serving the calling party, transport the call through its network to the serving wire center nearest the called party, and switch the call at the terminating serving wire center. However, in a competitive environment, the originating carrier transports the call to the designated point of presence so that the interconnecting carrier may then transport and terminate the call to its end-user customer.

[107] The actual amount of toll revenue loss may not be significant. In some instances, an ILEC may need to transport a call to a POI beyond the local calling area and may charge only local rates to its customer; however, such cases are balanced out by other instances in which an ILEC may charge its customers toll rates even though it

Moreover, to the extent that the Commission considers imposing compensation schemes on landline carriers' use of NXXs, the Commission should not extend such schemes to CMRS providers because of the unique mobile nature of their service. The mobile nature of CMRS makes it impossible to ensure that a CMRS customer will always be located within the geographic area of its assigned NXX. Furthermore, in contrast to the allegations leveled at wireline CLECs, there has been no reported history of CMRS providers offering customers NXXs in geographic areas outside of which they are predominantly located in an attempt to avoid access or toll charges.[108] In any event, due to the large size of wireless local calling areas, the number of instances were the ILEC would be entitled to access charges are reduced in a CMRS context.

Accordingly, the Commission should affirm that virtual NXXs are appropriate and permissible and that no specific rules on reciprocal compensation or transport are necessary for use of virtual NXXs. To the extent that the Commission entertains any sort of compensation for use of a virtual NXX, it should not extend application of such requirements to CMRS providers.

E. The Commission Should Ensure That All Requesting Telecommunications Carriers Have Access to UNEs and Interconnection on an Equal and Nondiscriminatory Basis

Despite the Commission's clear statements that CMRS providers are entitled to obtain access to interconnection and UNEs on a nondiscriminatory basis, ILECs have consistently

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(Footnote continued)
transports the call to a POI located within the local calling area, simply because the called party has an NXX associated with a rating point that is located outside the local calling area.

[108] In some instances involving number shortages, CMRS providers have been required to use numbers from distant geographical locations. *See Petition for Declaratory Ruling and Request for Expedited Action on the July 15, 1997 Order of the Pennsylvania Public Utility Commission Regarding Area Codes 412, 610, 215, and 717*, Memorandum Opinion and Order and Order on Reconsideration, 13 FCC Rcd. 19009, 19025, ¶ 43, n. 123 (1998). However, because this practice places the carrier at a competitive disadvantage, CMRS providers have been among the strongest advocates of ensuring an adequate supply of numbers in all rate centers where there is a demand so that this problem can be avoided.

resisted complying with this statutory requirement, particularly as it pertains to CMRS providers. AWS urges the Commission to reaffirm that CMRS providers are "telecommunications carriers" entitled to nondiscriminatory access to interconnection and UNEs under sections 251 and 252 of the 1996 Act; and that CMRS providers do not need to obtain certification as a CLEC in order to obtain such rights from the ILECs.

The Commission recognized in the *Local Competition Order* that CMRS providers are entitled to obtain interconnection from ILECs subject to section 252(d)(2) reciprocal compensation agreements and that "section 251 and 252 [applies] to LEC-CMRS interconnection."[109] The Commission also found in the *Local Competition Order* that section 251(c)(3) requires ILECs to provide "requesting telecommunications carriers" access to UNEs "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[110] In addition, the Commission defined a "telecommunications carrier" to include CMRS providers,[111] but declined to treat CMRS providers as "LECs" or to impose section 251(b) obligations on CMRS providers.[112]

CMRS providers continue to experience significant disadvantages and hurdles in obtaining access to UNEs and TELRIC pricing, despite the Commission's express conclusions discussed above. AWS, for example, has experienced great difficulty in obtaining transport facilities from ILECs at cost-based UNE prices and in obtaining UNE conversions, despite the

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[109] *Local Competition Order* at ¶ 33; *see also id.* at ¶¶ 1012, 1004 (Commission stated that CMRS providers offer telephone exchange service and exchange access, but concluded that "CMRS providers should *not be classified as LECs* at this time").

[110] 47 U.S.C. § 251(c)(3).

[111] *Local Competition Order* at ¶¶ 33, 1004, and 1012.

[112] *Local Competition Order* at ¶¶ 1004-06.

fact that ILECs are required by the Commission's rules and orders to provide such UNEs and UNE conversions to all requesting telecommunications carriers, *including CMRS providers*.[113]

Moreover, ILECs have refused to allow CMRS providers to adopt portions, or all, of CLEC interconnection agreements, unless the CMRS provider becomes certificated as a CLEC and agrees to define "local calling area" in the manner dictated by the state commission for wireline carriers. ILECs have also challenged CMRS providers' ability to obtain certain services they provide to CLECs, including access to their OSS, directory assistance or local number portability without CLEC certification and entry into a CLEC agreement. Such a requirement clearly contravenes the 1996 Act and the Commission's pronouncements that not only are CMRS providers entitled to all rights under sections 251 and 252 as "requesting telecommunications carriers," but also that CMRS providers should not be regulated as LECs.[114] In clear contravention of their non-discrimination obligations, ILECs have also failed to provide CMRS providers with the same quality of service measuring and performance level guarantees they provide to CLECs.

In conclusion, CMRS providers are impeded from obtaining transport services on the same rates, terms, and conditions as other carriers under the existing CPNP system. Whether carriers receive such services and UNEs on the same rates, terms, and conditions is part and

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[113] *See Local Competition Order* at ¶¶ 268, 1012-13; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 99-238, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 3696 at ¶¶ 321-68 (1999) (*UNE Remand Order*); Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, *Supplemental Order Clarification*, 15 FCC Rcd. 9587 (2000). *See also* Letter from Douglas Brandon, Vice President, Legal and External Affairs, AT&T Wireless Services, Inc., to Michelle Carey, Chief, Common Carrier Bureau, Federal Communications Commission, dated April 6, 2001 (detailing efforts of AWS to convert special access facilities to UNEs); and Ex Parte Letter from AT&T Wireless Corporation, VoiceStream Wireless Corporation and United States Cellular Corporation, dated April 12, 2000, in CC Docket No. 96-98.

[114] *Local Competition Order* at ¶¶ 1004-06. These requirements are also directly contrary to the Commission's admonition to the States that the: "[s]tates may not impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and arbitrated pursuant to sections 251 and 252." *Id.* at ¶ 1026.

parcel of whether intercarrier compensation is efficient and equitable. The Commission should expressly reaffirm and require ILECs to afford CMRS providers the ability to obtain interconnection and UNEs under sections 251 and 252 on a nondiscriminatory basis so that CMRS providers do not continue to face these inequities and disadvantages in the local market. Specifically, the Commission should reaffirm that:

- CMRS providers may opt into all, or part of any existing CLEC interconnection agreements without obtaining CLEC certification and while using the Commission's definition of local calling area,[115]
- CMRS providers should be able to obtain service quality for UNEs and interconnection equal to that of other carriers, and
- CMRS providers should be able to obtain UNE conversions for special access services.

VII. CONCLUSION

For the foregoing reasons, AWS respectfully urges the Commission to adopt a bill and keep regime for all intercarrier compensation, including access charges and reciprocal compensation. A bill and keep system accurately and appropriately reflects the benefits of a telephone call to both the calling and called party; is administratively simple and efficient; promotes competitive and technological neutrality; and is pro-competitive. Adopting a bill and keep regime will further advance competition and interconnection between CMRS networks and other carriers, while preventing carriers from manipulating the regulatory framework.

[115] CMRS providers should also be allowed to remove portions of CLEC agreements that do not apply to them. For example, CMRS providers should be able to pick and choose CLEC appendices on OSS and not adopt the 911 and number portability requirements of such CLEC agreements (because CMRS providers are currently treated differently from CLECs for these purposes).

Moreover**,** under a bill and keep regime, the Commission should revise its rules regarding the costs of transport so that both interconnecting parties share equal engineering and financial responsibility for exchanging traffic, including the construction and maintenance of facilities for exchanging that traffic. By requiring both the ILEC and the interconnecting carrier to share in the costs of transport, both parties will have equal incentive to establish efficient network architectures. Further, equal sharing in the costs of transport is also competitively and technologically neutral and accurately reflects that both calling and called parties benefit from a call.

To the extent, however, that the Commission determines not to immediately adopt a bill and keep system for all intercarrier compensation, the Commission should consider implementing a bill and keep system at a minimum for both intra- and inter-MTA CMRS traffic. As noted, current compensation for CMRS calls already recognizes that both called and calling parties benefit from a telephone call. Further, the current compensation schemes for CMRS traffic—both intra and inter-MTA and long distance—are skewed, confused, and inequitable. The Commission has plenary jurisdiction to regulate CMRS-LEC rates and interconnection under section 332(c) and should fully exercise its authority under the Act to reform the current compensation system for CMRS traffic to a system of bill and keep.

Finally, to the extent that the Commission determines to maintain a CPNP system, AWS urges the Commission to reaffirm various of its pro-competitive rules and requirements, including requiring ILECs to provide equal and nondiscriminatory access to interconnection and UNEs to CMRS providers, and also to adopt new rules or modifications to the CPNP system,

such as requiring carriers to bear equal portions of the cost of transport to and from a POI, in order to ensure that CMRS providers are not unduly disadvantaged or burdened.

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